> "* * * I am an accountant in business for myself and conduct my business from 36 Richmond Terrace, Staten Island, New York. That I am not a certified public accountant and I am not enrolled to practice before the Treasury Department * * *."

14. Until advised by my attorneys, I did not understand the significance of Mr. Mack's lack of qualification to represent [64] taxpayers before the Treasury Department and the inherent illegality of the representation.

15. I am informed by my counsel that the illegal acts of Mr. Mack in representing me before the Treasury Department and the illegal acts of the agents in participating in such representation render all the proceedings engaged in by them nugatory and void.

16. I am informed by my counsel that the acts of Mr. Mack in undertaking any such representation before the Treasury Department were illegal and a violation of the criminal laws of the State of New York. The participation of the agents therein was both illegal under the laws of the State of New York and their dealings with and revelations of my tax affairs to Mr. Mack constitute a violation of pertinent laws and regulations of the United States.

17. At no time did I give authority, express or implied, to Mr. Mack to make my private books, records and papers available to agents of the Treasury Department engaged in a criminal investigation, nor did I authorize him, directly or indirectly, to waive any rights which are guaranteed to me as a private person under the Constitution of the United States.

18. I now know that Mr. Skolnick is a Special Agent of the Internal Revenue Service and it appears that he

was conducting a joint investigation in which he was responsible for the criminal features of my case from the outset and for the procurement of proper proof to establish a criminal charge of income tax evasion against me. I had no knowledge of this at the time of the initiation or of the pendency of the examination. It now appears that Special Agent Skolnick master minded the machinations of Internal Revenue Agents who were the innocuous appearing tools used by him in developing a criminal charge against me and whose identities were availed of for the purpose of cloaking the proceedings with the [65] appearance of an innocent civil examination, furthgr explaining the use of receipts and letters which bear on their face indications of a civil proceeding rather than a criminal one.

19. The ostensibility civil nature of my examination was made manifest to me by the identity of agents as Internal Revenue Agents, who commenced it, and it was reinforced by the nature of their discussions with Mr. Mack reported to me, the receipts given for papers (attached hereto as "Exhibit B"), and the letter from the District Director of Internal Revenue, attached as "Exhibit A."

20. At the behest of the agents, and as their agent, Mr. Mack obligingly disclosed evidence and papers in response to every demand. In the affidavit procured by Mr. Skolnick, Mr. Mack stated:

> "At the time Russo retained me, he furnished me with all available records of his business expenditures. These records consisted only of bank statements, cancelled checks and check stub books. At the request of the Internal Revenue Service, I made an analysis of these records on 14 columnar work sheets and I made a summary of my find-

> ings on 7 columnar worksheets. My findings were made available to Revenue Agent Thomas J. Ginnane of the Internal Revenue Service. * * *
>
> "When I completed my analysis of the records, I immediately turned over to Revenue Agent John Foley of the Internal Revenue Service my analysis and available records which he returned to me at a later date. Subsequently the same analysis and records were inspected at my office, * * * by Revenue Agent Thomas Ginnane. James D. Russo did not inspect these analysis sheets and he had no knowledge of the exact amount of the expenses as shown by these analysis sheets."

Mr. Mack thus became the willing tool of the agents who, aware of Mack's lack of qualification, seized upon him as a conduit for the transmission of evidence, papers and material needed by them in the preparation of the criminal charge against me, all without my knowledge.

[66] 21. I am informed and verily believe that my private books, records and papers thus obtained contain information which said agents could not otherwise have obtained by lawful and proper means.

22. I am informed and verily believe that using the information thus obtained from my private books and records and the leads and clues obtained therefrom, Special Agent Skolnick then recommended criminal action against me.

23. I am informed and verily believe that relying upon the same information obtained in the manner aforesaid, this matter was ultimately referred to the Department of Justice and then to the United States Attorney for the Eastern District of New York for prosecution, who now has under consideration the question of whether my case shall be submitted to the Grand Jury.

24. At no time was I, directly or indirectly, advised by Special Agent Skolnick or the Internal Revenue Agents working under Mr. Skolnick's direction that their investigation of my income tax returns for the years involved was for the purpose of obtaining evidence in connection with a criminal prosecution against me; nor was I ever warned by either of them that any of my private books, records or papers, or information obtained therefrom, might be used against me in a criminal proceeding; nor was I ever advised by either of them of my rights under the law or my constitutional rights under the Fourth and Fifth Amendments to the Constitution.

25. The aforesaid agents at no time served upon me any search warrant or other lawful process to permit their access to my private books, records and papers, nor did they have any permission from me so to do in connection with their criminal investigation as aforesaid.

26. I am informed and verily believe that the taking and use of my private books, records and papers by means of masquerade, [67] misrepresentation, fraud and deceit and all leads, clues and other information derived therefrom or revealed thereby, directly or by any use or advantage thereby obtained is in violation and in derogation of my rights under the laws of the United States, the Constitution of the United States and particularly the Fourth and Fifth amendments thereto.

27. I am informed and I believe that by virtue of clues and leads obtained as aforesaid, the Internal Revenue Service was enabled to obtain additional information and records.

28. In view of the foregoing, an order to show cause to initiate this special proceeding is prayed for so as to bring this application on to be heard before an indictment is sought against me. It is my purpose to avoid the shame

and obloquy which attach to a person once the shadow of indictment has fallen across his path. The order to show cause prayed for herein also provides that the United States Attorney be stayed from submitting any evidence illegally obtained as aforesaid and any of the fruits therefrom to the Grand Jury pending the determination of this proceeding and the service of notice of entry of an order hereon. It is made returnable at the next Civil Motion day.

29. No previous application has been made for the same or similar relief.

WHEREFORE, I pray that an order pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure be made herein directing the return of all private books, records, and papers, extracts, notes and copies therefrom and all other property belonging to me seized by agents and representatives of the United States of America and now in the possession of the United States Attorney for the Eastern District of New York and other agents and representatives of the United States [68] of America; that the said papers, notes, copies and all clues and leads therefrom be suppressed and that the United States Attorney for the Eastern District of New York and all other agents and representatives of the United States of America be restrained from using any of said private books, records, papers, and extracts, notes and copies therefrom and all other private property belonging to me, or any information, directly or indirectly obtained therefrom and by means thereof or as a result of the examination and use thereof, and leads and clues revealed thereby; and that the said United States Attorney and said other agents of the United States of America be restrained from submitting any such evidence or other illegally obtained evidence to the Grand Jury or from using any thereof on a trial or for any purpose; and that a hear-

Exhibit A, Annexed to Foregoing Affidavit of James D. Russo

ing be held and that evidence may be adduced for the determination of issues of fact arising out of this application; and for such other and further relief as to the Court may seem just and proper.

(Sworn to by James D. Russo, Feb. 13, 1956.)

Exhibit A, Annexed to Foregoing Affidavit of James D. Russo:

[69]

UNITED STATES TREASURY DEPARTMENT

OFFICE OF THE DISTRICT DIRECTOR OF INTERNAL REVENUE

Lower Manhattan

New York 7, New York

July 12, 1954

In replying refer to:

Chief, Audit Division
90 Church Street
New York 7, N. Y.

Symbols: LM:A:FA:JJM-N:TJG

Years: 1949, 1950, 1951, 1952

Mr. and Mrs. James D. Russo
94 Van Name Avenue,
Staten Island 3, N. Y.

Your income tax returns for the years above indicated have been referred to this office for verification.

Exhibit A, Annexed to Foregoing Affidavit of James D. Fosso

Examination of records used in the preparation of your returns will be made at 478 Bay Street, Staten Island, N. Y.

It is requested that you appear at that address on July 16, 1954, at 10 A. M., bringing with you the following items, where applicable, for the years listed:

1. Retained copies of income tax returns and withholding tax receipts, Forms W-2.

2. Cancelled checks, receipts or other records in support of all itemized deductions claimed.

3. Property records including record of mortgage and tax payments on real estate or other assets.

4. Bank records and cancelled checks including those of your spouse and children.

5. All work sheets pertaining to items of income and deductions appearing on the returns and to the computation of tax liability as reported.

If you are unable to appear at the specified time please contact Internal Revenue Agent Thomas J. Ginnane at REctor 2-9100, Extension 8234 or at GIbraltor 7-0711. Correspondence should be mailed to the address indicated above.

Please present this notice.

Very truly yours,

(Signed) DENIS J. McMAHON
District Director of Internal Revenue
Lower Manhattan

Exhibit B, Annexed to Foregoing Affidavit of James D. Russo.

[70]

September 23, 1955

Received this date from William Mack, 36 Richmond Terrace, Staten Island, N. Y., the following worksheets pertaining to the tax examination of James D. Russo for the years 1949, 1950, 1951.

1949—Analysis of bank account and summary

4-14 column worksheets
1- 7 column "

1950—same

5-14 column worksheets
1- 7 " "

1951—same

3-14 column worksheets
4- 7 " "

THOMAS J. GINNANE
Internal Revenue Agent

Order Vacating Stay Contained in Order to Show Cause.

[90]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

At Brooklyn, New York, in said District on February 23, 1956.

An affidavit having been submitted to this Court by Leonard P. Moore, United States Attorney for the Eastern District of New York, and a hearing having been held before this Court on February 23, 1956,

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, it is

ORDERED, ADJUDGED AND DECREED that the stay contained in the order to show cause, dated February 16, 1956, and issued by this Court, be and the same is hereby vacated.

Dated: Brooklyn, N. Y., February 23, 1956.

/s/ LEO F. RAYFIEL
United States District Judge.

Affidavit of John Foley.

[91]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Kings, ss:

JOHN FOLEY, being duly sworn deposes and says that he is a Revenue Agent of the Internal Revenue Service, Treasury Department of the United States, duly appointed according to law and acting as such.

That my present assignment is Chief of the Office Audit Branch, Lower Manhattan, ~~which~~ position I have held since June 15, 1954.

That in September of 1952, I was employed as a Revenue Agent assigned to Staten Island and during that month was assigned by my superiors to conduct an examination of various tax returns which had been prepared by James D. Russo and was also directed to conduct a similar examination as to Mr. Russo's return.

In connection with the examination of Mr. Russo's return it was necessary to secure a waiver, form 872, for the purpose of extending the Statute of Limitations beyond March 15, 1953, with respect to the year 1949. Accordingly a waiver form was mailed to Mr. Russo but when he failed to return it I communicated with him by telephone, spoke [92] to him briefly about the necessity for the waiver form and was referred by him to Mr. Frank Paulo who was then a practicing attorney in Staten Island and who, I am informed, is a Justice of the Municipal Court on Staten Island.

I had extensive conversations with Mr. Paulo concerning the necessity of receiving the waiver and outlined the consequences if it was not signed. Mr. Paulo agreed to

furnish the waiver and accordingly on February 12, 1953 a waiver executed by Mr. Russo was received by my office.

In May of 1953, my investigation into Mr. Russo's matter had reached the stage where it appeared advisable to examine his records in connection with the tax returns. I therefore communicated with Mr. Frank Paulo to arrange for such an examination into Mr. Russo's returns for the years 1949, 1950 and 1951. No appointment could be arranged at that time. However, in a telephone conversation with Mr. Paulo during the month of May, 1953, I was informed that Bill Mack, an accountant with offices at 36 Richmond Terrace, Staten Island, was attempting to assemble Mr. Russo's records and would communicate with me when they were so assembled. From previous contacts with Mr. Paulo's office in other tax matters I had had occasion to meet Mr. Mack who had done similar work for Mr. Paulo in these other matters, including one matter involving an examination of the 36 Richmond Terrace Corporation, a corporation in which Mr. Paulo was a majority stockholder himself.

Numerous attempts were made by me to secure the books and records from Mr. Russo through Mr. Paulo or Mr. Mack during the ensuing months and in September of 1953, I was informed that Mr. Paulo would finally permit Mr. Mack [93] to submit the books and records to me in about a week. On or about October 8, 1953, I communicated with Mr. Paulo and received permission from him to pick up the books and records of Mr. Russo from Mr. Mack. After several telephone calls and trips made by me to Mr. Mack's office without success I finally received certain records from Mr. Mack on or about October 27, 1953.

The records submitted and received by me consisted of bank statements, cancelled checks, checkbook stubs and worksheets prepared by Mr. Mack from these records for each of the years 1949, 1950 and 1951. These records

were considered incomplete since the bank statements for May and June of 1949 were missing. Some checks were missing also and could not be identified by examination of stubs. Mr. Mack's worksheets represented his analysis of the various checks and purported to show expenditures by Mr. Russo for business purposes.

From the records submitted by Mr. Mack an analysis of the checks labelled "loans" was made, the names of insurance companies with whom Mr. Russo did business were listed and Mr. Russo's deposits and bank balances for the years 1949, 1950 and 1951 were noted in my work papers.

On November 16, 1953, Mr. Mack appeared at my office and requested the return of the records which had been submitted to me by him previously. I informed him that I would like a letter from him making the request and accordingly on November 23, 1953, Mr. Mack directed such a letter to me and the records were returned to him immediately.

At the request of Assistant United States Attorney Kenneth C. Sternberg I have examined photostatic copies [94] of worksheets obtained from Mr. Mack by Revenue Agent Thomas Ginnane on September 23, 1955, and to the best of my recollection they appear to be identical with the papers previously submitted to me with the consent of Mr. Paulo the attorney then representing Mr. Russo and returned by me to Mr. Mack when requested.

(Sworn to by John Foley, Feb. 21, 1956.)

Affidavit of Morris Skolnick.

[95]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Kings, ss:

MORRIS SKOLNICK, being duly sworn, deposes and says:

I am a Special Agent of the Internal Revenue Service, Treasury Department of the United States, duly appointed according to law and acting as such and have held this position since July, 1950.

In the early part of 1952 I was assigned to investigate a number of tax returns which investigation required a conference with the petitioner.

On June 23, 1952, I telephoned to the petitioner at his office in the County Clerk's Office of Richmond County, where he was then employed. He said that he could not leave his office to come to the office of the Intelligence Division in New York and I then told him that I would come to his office in Staten Island.

On June 26, 1952, I, for the first time, met and talked with petitioner in the library of the County Court House of Richmond County. During the interview he told me that he had worked in the County Clerk's Office for [96] some years and that he was also conducting an insurance business. He also said that he had prepared income tax returns for other individuals and promised to give me a list of the names of the individuals for whom he had prepared such tax returns. He described his insurance business generally and gave me the names of the various companies with which he had done business.

Affidavit of Morris Skolnick

On July 3, 1952, the petitioner telephoned me at my office and told me that the list was almost completed and that he wished to submit it to me in person.

On July 8, 1952, petitioner came to my office, at 253 Broadway, New York, and handed me a list containing the names of some seventy-five persons. He also gave me the names of the two banks in which he said he had checking accounts.

On February 10, 1953, I received a telephone call from Frank D. Paulo, Esq., an attorney then practising law with offices in Staten Island, who advised me that petitioner had retained him to represent petitioner.

On May 6, 1953, petitioner himself telephoned and told me that he had retained Mr. Paulo to represent him and suggested that I communicate with Mr. Paulo with respect to a possible appointment for an interview.

On May 8, 1953, after receiving a message that Mr. Paulo had called me I called him back and made an appointment to interview petitioner on May 19, 1953, at 253 Broadway.

On May 19, 1953, Mr. Paulo and petitioner came to my office and an interview ensued. I said, "Mr. Russo, you have been asked to appear here this morning in connection with an official investigation being conducted by the [97] Bureau of Internal Revenue. I want to ask certain questions in the form of a sworn statement. Do you have any objection to making a statement under oath?" to which the petitioner replied "No, sir." Petitioner then took an oath to tell "the truth, the whole truth and nothing but the truth" and answered the various questions which I asked, one of which was:

> "Q. Do you understand, that according to your constitutional rights, you may decline to answer any questions that might tend to incriminate you under a Federal Statute? Do you understand this? A. Yes, sir."

Affidavit of Morris Skolnick

After petitioner had said that he was employed in the County Clerk's Office of Richmond County I asked:

"Q. What other types of activities do you engage in?"

to which he responded "Insurance and real estate." Petitioner told me that during the years 1949, 1950 and 1951 he represented some seven insurance companies, the names of which he gave me. I asked him whether he reported his income from his insurance business on his income tax returns for the years 1949 through 1951 to which he replied "Yes, sir, to the best of my ability." and said that he maintained various records for his insurance business income which included statements of premiums, receipts of payments, checks, deposit books, and expiration dates. He said that the records which he maintained showed commissions received and were in a receipt book which showed the premiums collected. Concerning his bank account in which moneys collected were deposited he said "There was only one account that I had." The interview [98] continued for some time and was taken down stenographically and transcribed.

On June 9, 1953, petitioner's attorney, Mr. Paulo, telephoned me to inquire whether June 22, 1953, would be convenient as a date on which petitioner could sign his statement. Subsequently, on June 19, 1953, Mr. Paulo telephoned requesting a postponement until July 2. On July 2, 1953, Mr. Paulo and the petitioner called at my office where he read his transcribed statement and initialed each page in the lower right-hand corner. He then signed the statement under the following paragraph:

"I have carefully read the foregoing statement, consisting of twenty-two (22) pages, which is a transcript of questions which were propounded to me and my answers to such questions. I hereby certify that the foregoing answers are true and

correct to the best of my knowledge and belief, and that I have made the corrections shown and have placed my initials opposite each correction."

At the time he signed the statement, he again took an oath before me.

In August, 1953, I called upon the Travelers Company and the United States Fidelity & Guaranty Company and learned of the volume of business which petitioner did with these companies. These were two of the companies whose names petitioner had given to me previously.

On December 10, 1954, I communicated with Mr. Russo, the petitioner, with respect to a further interview. I had learned that his attorney, Mr. Paulo, was now a Judge in Staten Island, and could no longer represent Mr. Russo, and called him directly for that reason. Petitioner stated that he was agreeable to coming to my office on December 16, 1954, and that he desired to bring Mr. William [99] Mack with him.

On December 16, 1954, petitioner and Mr. Mack arrived at my office. Petitioner was asked whether he would answer questions under oath and said that he did not want to answer any questions under oath as he previously had legal counsel and did not have any at that time; that Mr. Paulo, who previously was his legal counsel, was now a Judge; that he had no objection to being questioned informally in the presence of his accountant Mack. I then told him that he need not answer any questions that would incriminate him and advised him of his constitutional rights. During this interview petitioner told me of the nature and extent of his property; his insurance and real estate business; and gave me a general description of the books and records which he kept.

No. [redacted] 163

Office Supreme Court
FILED
JUN 3 1957
JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit.

IN THE MATTER
OF
The Application of JAMES D. RUSSO, for an Order Declaring Unreasonable, Illegal and Void a Certain Search and Seizure, etc.

JAMES D. RUSSO,
Appellant,

THE UNITED STATES OF AMERICA,
Appellee.

APPENDIX TO APPELLANT'S BRIEF.

On Appeal From the United States District Court for the Eastern District of New York.

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

IN THE MATTER

of

The Application of JAMES D. RUSSO, for an Order Declaring Unreasonable, Illegal and Void a Certain Search and Seizure, etc.

JAMES D. RUSSO,

Appellant,

THE UNITED STATES OF AMERICA,

Appellee.

Statement Under Rule 15(b).

The above-entitled action was commenced in the United States District Court for the Eastern District of New York, on February 16, 1956, when the Honorable Leo F. Rayfiel, U. S. D. J., signed an order to show cause, declaring unreasonable, illegal and void a certain search and seizure, etc. The affidavit of James D. Russo was filed in support thereof. On February 23, 1956, the Honorable Leo F. Rayfiel, U. S. D. J., signed an order vacating the stay in the order to show cause of February 16, 1956. Affidavit of John Foley, Morris Skolnick and Leonard P. Moore were filed in support thereof. On February 27, 1956, the Honorable Leo F. Rayfiel, U. S. D. J., signed an order to show cause for the taking of the deposition of William Mack. An affidavit of Boris Kostelanetz was filed in support thereof. The affidavit

of Frank B. Paulo and a supplemental affidavit of James D. Russo were filed in further support of petitioner's application on March 5, 1956.

On June 27, 1956, the Honorable Leo F. Rayfiel, U. S. D. J., filed an opinion denying petitioner's motions for an order declaring unreasonable, illegal and void a certain search and seizure, etc., and for an order granting leave to petitioner to take the deposition of William Mack.

Petitioner, James D. Russo, filed his notice of appeal on July 5, 1956.

Order to Show Cause.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER

of

The Application of JAMES D. RUSSO, for an Order Declaring Unreasonable, Illegal and Void a Certain Search and Seizure, etc.

[56] Upon reading the annexed affidavit of James D. Russo, sworn to February 13, 1956, and on motion of Corcoran, Kostelanetz & Gladstone, Esqs., attorneys for the petitioner herein, it is

ORDERED, that the United States Attorney for the Eastern District of New York show cause at a stated term for Civil Motions of this Court in Room 727 of the United

States Court House, Washington and Johnson Streets, Brooklyn, New York, on the 23d day of February, 1956, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure:

1. Declaring unreasonable, illegal and void the search and seizure made as alleged in the attached petition:

2. Directing the return of all books, papers, records, memoranda, extracts, notes and copies therefrom, other documents and all other property belonging to the above captioned petitioner taken by agents and representatives of the United States Government and now in the possession of the United States Attorney or other agents or representatives of the United States of America;

3. Directing that any and all of the aforesaid documents, books, papers, memoranda and all other property belonging [57] to the above captioned petitioner be suppressed and that the United States Attorney and all other agents of the Government be restrained and precluded from using any of said books, papers, records, memoranda, other documents and all other property belonging to the above captioned petitioner, or any information directly or indirectly obtained therefrom or by means thereof or as a result of examination and use thereof and leads and clues revealed thereby and that all information disclosed to the Government or to its agents by the petitioner above captioned, or directly or indirectly obtained by the Government through or as a result of or derived from the use of such information, and all leads, clues and other evidence directly or indirectly obtained by or through or derived from or revealed by such information be suppressed and that the United States Attorney and all other agents or representatives of the United States Government be restrained from submitting same to a Grand Jury, from using same on any trial or for any other purpose;

4. Directing that a hearing be held and that evidence may be adduced for the determination of issues of fact arising out of this motion;

and it is further

ORDERED, that the United States Attorney for the Eastern District of New York and all other agents and representatives of the United States of America be and they hereby are stayed from submitting any evidence or information to a Grand Jury or from taking any other or further proceedings in relation to the above captioned petitioner pending the determination of this application and the service of notice of entry of an order hereon; and it is further

ORDERED, that sufficient cause appearing therefor, let service of a copy of this order and the affidavit upon which it is [58] based by delivering same personally to the United States Attorney for the Eastern District of New York or to such other person designated by him to receive service of process on or before 4:00 P. M., February 17, 1956, be deemed good and sufficient service.

Dated: New York, N. Y., February 16, 1956.

/s/ LEO F. RAYFIEL,
United States District Judge

A True Copy.
Attest
Dated February 16, 1956
PERCY G. B. GILKES
Clerk
By MARIE R. BARETTE,
Deputy Clerk

Affidavit of James D. Russo, Read in Support of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[59]

[SAME TITLE.]

State of New York,
County of New York, ss:

JAMES D. RUSSO, being duly sworn, deposes and says:

1. I am the petitioner in the above encaptioned special proceeding, and have knowledge of the facts hereinafter set forth.

2. This is an application for an order pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure suppressing certain evidence and certain of my private books, records, papers, copies therefrom and extracts, notes and information taken therefrom, more particularly set forth in the order to show cause herein, on the ground that such evidence, books, records and papers, and the information obtained therefrom were obtained by means of, and as a result of violation of the Fourth and Fifth Amendments to the Constitution and the Laws of the United States.

3. During the summer of 1952, while I was engaged in my regular occupation of Assistant Clerk in the office of the Clerk of the County of Richmond, a man approached me and introduced himself as Morris Skolnick of the Bureau of Internal Revenue. Mr. Skolnick interviewed me and stated in substance that certain income tax returns [60] which I had prepared for others were incorrect. He asked my help in ascertaining the identities of the individuals for whom I had prepared tax

returns and he requested generally that I assist the United States Government to the end that the Government be reimbursed if it should appear that the income tax of these individuals had been incorrectly computed because certain of the items of income and expenses given me in those returns were allegedly incorrect. I assisted Mr. Skolnick in obtaining this information.'

4. In May 1953, consistent with the foregoing, I appeared at the office of Mr. Skolnick and was formally interrogated. It is not to be doubted that Mr. Skolnick was then still investigating the returns of other individuals, although, as my counsel advised me, his interrogation also pointed to an investigation of a possible violation of Internal Revenue Code 3793(b)(1) of the Act of 1939. The interrogation ended with an expression of gratitude to me on the part of Mr. Skolnick. Confirming the foregoing, my counsel now advises me that from the face of the interrogation, Mr. Skolnick was interested in a violation of the Internal Revenue Code by other people and by the possibility of a violation of the section dealing with aiders, abettors, counselors, advisers, etc., but he did not question my own tax matter and touched on the subject of my own occupation only in a passing way.

5. In 1953, I retained one William Mack, who held himself out to be an accountant, to review my books and records for 1949, 1950 and 1951. I knew nothing of any criminal investigation of my tax returns.

6. Thereafter, in accord with Mr. Mack's directions, I turned over to Mr. Mack my records of cancelled checks, bank statements and the like.

[61] 7. Thereafter, and in July, 1954, I received in the mail from the District Director of Internal Revenue a communication which confirmed the civil nature of the ex-

amination. The letter directed me to contact Mr. Thomas J. Ginnane, who is described in this letter as an Internal Revenue Agent. The letter also directs that written replies be addressed to the "Audit Division." A photostatic copy of said communication together with envelope is attached hereto as "Exhibit A," and made a part hereof.

8. Throughout the latter part of 1953 and continuing through 1954, and the first part of 1955, as well, Mr. Mack stated to me from time to time that he was consulting the Internal Revenue Service, making arguments and filing papers on the matter, which were unknown to me, and that the matter should be cleared up shortly. He said that it was his job to make a recomputation of my income and that additional tax, if any, in due course, would be determined.

9. Between May, 1953, when I discussed with Mr. Skolnick the income tax returns I had prepared for others, and the spring of 1955, I never saw Mr. Skolnick.

10. In the spring of 1955, I received a telephone call from Mr. Skolnick who asked me to come to see him. I came to his office accompanied by Mr. Mack who said he should accompany me. When we arrived, Mr. Skolnick greeted Mr. Mack but before commencing any discussion, he inquired whether Mr. Mack had a card authorizing him to practice before the Treasury Department. Mr. Mack said that he did not, that Mr. Skolnick knew he did not, and that he had been dealing with Mr. Skolnick on this matter for a long time and that he did not understand Mr. Skolnick's sudden concern at this time. Mr. Skolnick then stated that Mr. Mack's lack of a Treasury card did not matter. The Agent then proceeded with the interrogation, by far the greatest

part of the [62] questions being answered by Mr. Mack. This is the first time I heard of the necessity for admission to practice before the Treasury and Mr. Mack's lack thereof. Mr. Mack argued many points of fact and law, the substance of which I did not understand.

11. Throughout the entire course of the examination of my returns, the examination was treated as an attempt to achieve a civil settlement. My conviction that this was the purpose of the audit was reinforced and confirmed by the letter of Internal Revenue Agent Ginnane (attached hereto as "Exhibit A"). The civil nature of this audit was even further manifested at a later date when Revenue Agent Ginnane prepared a receipt for papers Mr. Mack had given him in which he acknowledged the receipt of "* * * the following work sheets pertaining to the tax examination of James D. Russo for the years 1949, 1950 and 1951." Neither the words "fraud investigation" nor any one of them appear in this receipt, and it is signed "Thomas J. Ginnane, Internal Revenue Agent." It was undoubtedly known to Mr. Mack that an Internal Revenue Agent is an officer whose duty it is to audit a taxpayer's return and make the consequential civil settlement of any claim.

12. I now know that Mr. William Mack, who acted as my representative before the Internal Revenue Service, is unenrolled and not admitted to practice before the Internal Revenue Service. He is neither a lawyer nor a certified public accountant. He was engaged by me specifically for the purpose of this representation and was not, for the years involved, the accountant or bookkeeper customarily employed by me in the regular course of my business. In an affidavit sworn to September 23, 1955, before Mr. Skolnick, and made at Mr. Skolnick's behest, Mr. Mack swore as follows:

"* * * During the year 1953, James D. Russo of 94 Van Name Avenue, Staten Island 3, N. Y., retained me as an accountant to represent him in a tax investigation being conducted by the Internal Revenue Service. Prior to this time I did not do any accounting work for Russo."

[63] 13. I am informed by my counsel that the Congress of the United States has provided for the establishment of rules and regulations by the Secretary of the Treasury governing the recognition, qualification and enrollment for practice of individuals before the Treasury Department. I am also informed that stringent regulations designed for the protection of taxpayers have been established by the Secretary. As I now know, Mr. Mack has never been granted the privilege of practice before the Internal Revenue Service and has never shown that he is possessed of the necessary qualifications to do so. The requirements include knowledge of the laws and regulations regulating to tax matters as well as other subjects. The regulations exclude unenrolled individuals from practice in relation to all matters connected with the presentation of a client's interest to the Treasury Department, including the preparation and filing of necessary written documents, correspondence with the Treasury Department relative to such interests, and other appropriate functions. Mr. Mack purported to do these things despite his disability and this basic disability, as it now appears, was known to the agents of the Treasury Department at all times, because as I am now informed, before a taxpayer may be represented before the Internal Revenue Service, his representative must file powers of attorney from the taxpayer. No such powers of attorney were filed. In the aforesaid affidavit procured by Mr. Skolnick from Mr. Mack, Mr. Mack stated:

Affidavit of Morris Skolnick

I have read the affidavit of James D. Russo, sworn to on February 13, 1956, and categorically deny that there was any conference between the petitioner, Mr. Mack, and myself in the spring of 1955, the only conference having been held on December 16, 1954. I did not then or at any other time tell petitioner or Mr. Mack that Mr. Mack's lack of a Treasury card did not matter nor was the greatest part of the questions at the conference answered by Mr. Mack. Mr. Mack did not argue points of fact and law; the conference was not treated as an attempt to achieve a civil settlement. Petitioner's statement in his affidavit "nor was I ever advised by either of them [referring to me amongst others] of my rights under the law or my constitutional rights under the Fourth and Fifth Amendments to the Constitution" is completely false as is shown by the statement under the oath which has been read, signed, [100] and sworn to by the petitioner himself—a statement which was made, signed, and sworn to in the presence of his own attorney.

None of the investigation conducted by me came about as a result of any clues or leads obtained from the books and records of petitioner with the possible exception of some one or two companies involving only approximately fifty dollars.

(Sworn to by Morris Skonick, Feb. 23, 1956.)

Affidavit of Leonard P. Moore.

[86]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Kings, ss:

LEONARD P. MOORE, being duly sworn, deposes and says:

I am the United States Attorney for the Eastern District of New York and am charged with the responsibility of presenting to the Grand Jury for their consideration and action evidence of crimes against the laws of the United States.

There have been submitted to this office, for presentation to the Grand Jury, facts which indicate that James D. Russo willfully aided and assisted in the preparation of false and fraudulent tax returns to be filed by other persons for the years 1949, 1950, and 1951 in violation of Section 3793 (b) (1) of the Internal Revenue Code.

It may be necessary to call as many as twenty-three witnesses in connection with this proceeding.

[87] The statute of limitations will run on March 15, 1956, and it is imperative, because of the shortness of time, that the presentation commence immediately.

Although the motion made in this proceeding relates only to an alleged illegal search and seizure made in respect to certain books and papers, claimed to have been obtained from an accountant said to have been employed by the taxpayer Russo, these books and papers do not relate in any way to the charges against Russo under Section 3793 (b) (1) of the Internal Revenue Code. Nevertheless, the terms of the *ex parte* temporary restraining order are so broad that they might well apply to any proceeding. They state that the United States

Attorney and all Agents and representatives of the United States are "stayed from submitting any evidence or information to a Grand Jury or from taking any other or further proceedings in relation to the above captioned petitioner [Russo] pending the determination of this application and the service of notice of entry of an order thereon."

Unless the stay is immediately vacated the Government will be unable, through its duly appointed law enforcement officers, to enforce the laws of the United States against those who have violated them.

The Department of Justice has also forwarded to this office, for the institution of criminal proceedings, a case involving the willful attempted tax evasion of James D. Russo of income taxes for the years 1949, 1950, and 1951 in violation of Section 145 (b) of the Internal Revnue Code.

[88] The statute of limitations for the year 1949 will bar prosecution on March 15, 1956. This office has been requested to proceed immediately with the presentation to the Grand Jury of the facts developed by Government Agents in their investigation. Many witnesses will have to be called in order to present the facts.

Whether the particular books and papers made the subject of the taxpayer's application are necessary for the presentation to the Grand Jury need not be determined at this time. The Government is in possession of facts in no way derived from these books and papers which will show that the taxpayer willfully failed to report his correct income for the years in question. Furthermore the affidavits submitted by Government Agents Skolnick and Foley definitely establish the only two salient facts determinative of the taxpayer's present petition, namely, that the taxpayer Russo was represented by an attorney, Frank D. Paulo, and that he furnished the information necessary to check the sources of his income voluntarily.

Affidavit of Leonard P. Moore

As early as May 19, 1953, the taxpayer Russo in the presence of his attorney voluntarily disclosed his business as an insurance agent, the names of the companies he represented, and the fact that he did business with them. Thus the taxpayer's source of income from insurance commissions was disclosed by him long before any of the events referred to in the petition which he now makes to the Court.

The petitioner, Russo, is fully protected in such rights as he may have because he can always move should an indictment result in the event that he can make [89] a meritorious showing that any books and papers were improperly taken or more properly at the trial itself when the Trial Judge will have an ample opportunity, in the light of all the evidence, to decide whether petitioner's rights have in any way been invaded.

WHEREFORE, I respectfully request that the temporary restraining order be vacated forthwith so that the Government may proceed in the manner prescribed by law to present evidence to the duly constituted Federal Grand Jury in this District.

(Sworn to by Leonard P. More, Feb. 23, 1956.)

Order to Show Cause to Take Deposition of William Mack.

[101]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

On reading and filing the affidavit of Boris Kostelanetz, sworn to February 27, 1956, it is

ORDERED, that the United States Attorney for the Eastern District of New York show cause at a Stated Term for motions to be held on the 29th day of February, 1956, at the United States Court House, Washington and Johnson Streets, Brooklyn, New York, in Room 727, at 10:00 A. M. in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made, pursuant to Rule 26 of the Federal Rules of Civil Procedure, granting leave to the above entitled petitioner to take the deposition of William Mack, whose address is 36 Richmond Terrace, Staten Island, New York, prior to the expiration of 20 days after the commencement of this special proceeding and why such other and further relief as the Court may deem just and proper should not be granted; and it is further

ORDERED, that sufficient cause having been shown, let service of a copy of this order together with a copy of the affidavit upon which it is made, by delivering same personally to the United States Attorney for the Eastern District of New York, or to some person designated by him to receive service of process, on or before 5 P. M., on February 27, 1956, be deemed good and sufficient service.

Dated: New York, February 27, 1956.

/s/ LEO F. RAYFIEL
United States District Judge

Affidavit of Boris Kostelanetz, Read in Support of Foregoing Motion.

[102]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

BORIS KOSTELANETZ, being duly sworn, deposes and says:

1. I am a member of Corcoran, Kostelanetz & Gladstone, the attorneys for the above encaptioned petitioner, and have knowledge of the facts hereinafter set forth.

2. This affidavit is made in support of a motion for leave to take the deposition of William Mack, whose business address is 36 Richmond Terrace, Staten Island, New York, prior to the expiration of 20 days after the commencement of this special proceeding on the ground that said William Mack has peculiar knowledge of facts which are vital and material to the issues presented herein.

3. This application for leave to take the deposition of this witness prior to the expiration of 20 days is made so that the Court and parties may have the benefit of this testimony prior to the submission of the issues to the Court for determination and prior to any hearing which may be ordered hereon.

4. This special proceeding was commenced by the filing of an order to show cause on February 16, 1956. The order to show cause [103] was personally served upon the respondent, United States, on February 17, 1956. The Court heard argument of the motion on preliminary affidavits on February 23 and February 24, 1956.

Affidavit of Boris Kostelanetz, Read in Support of Foregoing Motion.

and additional time was granted for the submission of further affidavits and memoranda.

5. As appeared from the argument of the motion, the testimony of William Mack will be of importance since he was the person who had transactions with agents of the Internal Revenue Service over a continuous period of more than a year and a half, at only one of which transactions the petitioner was present. The essential evidence which William Mack will be able to give the Court is not obtainable by petitioner from any other source. It is petitioner's desire to take his deposition pursuant to subpoena, at which time, of course, the United States Attorney or his representative will be present to participate in the examination.

6. In order to assume a prompt and speedy determination of the issues presented by this petitioner, petitioner asks leave to take such deposition prior to the expiration of the 20-day period stated in Rule 26 of the Federal Rules of Civil Procedure.

7. An order to show cause is prayed for herein in order to bring this application on to be heard on the next motion day so that determination of the main petition be not unduly delayed.

8. No previous application has been made for the same or similar relief prayed for herein.

WHEREFORE, your deponent respectfully prays that an order be made pursuant to Rule 26 of the Federal Rules of Civil Procedure granting leave to the petitioner to take the deposition of William Mack prior to the expiration of 20 days after the commencement of this special proceeding, and for such other and further relief as the Court may deem just and proper.

(Sworn to by Boris Kostelanetz, Feb. 27, 1956.)

Affidavit of Frank D. Paulo.

[104]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Kings, ss:

FRANK D. PAULO, being duly sworn, deposes and says:

1. That he has been a Justice of the Municipal Court of the City of New York from May 18, 1954 and that prior thereto he was a practicing attorney with offices at 36 Richmond Terrace, Staten Island 1, New York.

2. That in the very first part of 1953, James D. Russo consulted me regarding a request that he had received from Morris Skolnick to appear at his office in connection with an investigation being conducted with respect to certain income tax returns which had been prepared by Mr. Russo for persons other than himself.

3. That after communicating with Mr. Skolnick by telephone as to certain adjournments of the scheduled hearing, Mr. Russo and your deponent, as his attorney, finally appeared at Mr. Skolnick's office some time in May 1953. Mr. Russo was sworn as a witness by Mr. Skolnick and certain statements were taken under oath from Mr. Russo by Mr. Skolnick in the presence of your deponent. It is your deponent's recollection that this inquiry was directed to the preparation of other people's returns by Mr. Russo.

[105] 4. That a transcript of the statement made by Mr. Russo was later executed by Mr. Russo at Mr. Skolnick's office in the presence of your deponent. A copy of the signed statement was given to Mr. Russo.

5. That after the interrogation conducted by Mr. Skolnick in his office, and on about May 20, 1953, Mr. John

Foley, a representative of the Bureau, advised your deponent that he had been instructed to audit Mr. Russo's personal returns and his books and records. That later your deponent communicated this fact to Mr. Russo and arrangements were made whereby Mr. Russo engaged William Mack as an accountant with respect to the examination being made by Mr. Foley.

6. Your deponent at no time thereafter, except for the instances that will hereinbelow be noted, did any of the work in connection with the examination of Mr. Russo's personal tax returns or books and records. Any conferences that were held with any representatives of the Bureau, with respect to the examinations, were with Mr. Mack. All work sheets prepared and other work done in connection with the examination of Mr. Russo's books and records were done by Mr. Mack in conjunction with representatives of the Bureau. At no time was your deponent present at any of these conferences, nor did your deponent at any time inspect or see any of the work sheets prepared, nor did your deponent in any way take part in any of the examinations of Mr. Russo's personal tax returns or the presentation of Mr. Russo's case in connection with said returns. The reason for suggesting to Mr. Russo that he engage an accountant when your deponent was notified by Mr. Foley of the impending examination of Mr. Russo's personal tax returns and books and records was that your deponent did not possess the requisite accounting knowledge and, therefore, did not feel qualified to handle the matter.

[106] 7. Mr. Foley from time to time would make inquiries of your deponent as to when he could examine the books and records of Mr. Russo. His requests would be referred to Mr. Mack. On two occasions Mr. Foley had spoken to your deponent about tax waivers which were forwarded to Mr. Foley from Mr. Russo through your

deponent's office. There may have been occasions when your deponent notified Mr. Mack by telephone that Mr. Foley wanted to examine certain books or wanted certain papers in connection with his examination, but so far as your deponent is concerned, Mr. Mack was in complete and entire charge of the examination.

8. That as far as any disclosures made by Mr. Mack concerning Mr. Russo's affairs, deponent had no part in such disclosures in any manner. Your deponent was not present at any disclosures, and he did not supervise them.

9. The retention of Mr. Mack by Mr. Russo did not involve Mr. Mack working under deponent's direction or supervision in any way, nor was he compensated by your deponent in any way. At the time Mr. Mack was not in any sense a part of deponent's office staff and had his own office at another address. Parenthetically, however, it may be said that for many years Mr. Mack had done deponent's personal accounting work and had done such work for other clients, but always as an accountant employed and paid directly by them. He was also employed as an accountant in certain corporations in which I acted as an officer. At no time, in any of the corporations, where Mr. Mack and your deponent were acting as officers, was, or is, your deponent a majority stockholder.

10. While it is true that your deponent was an officer of Terrace Offices Corporation, your deponent did not discuss its tax [107] matters with Mr. Mack or Mr. Foley. Any tax matters in that corporation may have been handled by Mr. Mack, and some other officer of the corporation, but not your deponent.

11. Your deponent has no recollection of any other tax matter that he, Mr. Foley and Mr. Mack worked on.

(Sworn to by Frank D. Paulo, Feb. 27, 1956.)

Supplementary Affidavit of James D. Russo.

[108]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

JAMES D. RUSSO, being duly sworn, deposes and says:

1. I am the petitioner in the above entitled proceeding and have knowledge of the facts hereinafter set forth.

2. This is a supplementary affidavit in support of the application to suppress evidence, etc.

3. I am informed that on the first argument of this application, the question arose concerning the nature of the representation provided me by Frank D. Paulo, Esq., now a Justice of the Municipal Court of the City of New York. In the last half of 1952 and in the early part of 1953, I had given some assistance to the Internal Revenue Service in connection with the correction of certain alleged errors which might have appeared in income tax returns of others, in the preparation of which I had assisted. I was then asked to appear and give testimony in that connection and I engaged the services of Judge Paulo to represent me in the event my assistance in the preparation of the returns of others might involve me in their tax matters.

4. In 1953, when it appeared that my own income tax returns were about to be examined, Judge Paulo told me that he [109] preferred that I retain someone else to handle my income tax matter.

5. At this point, Judge Paulo withdrew from active participation in my case and did nothing thereafter, as his affidavit indicates, except to refer such telephone inquiries from the Internal Revenue Service, which continued to be directed to him, to Mr. William Mack. He also had some conversations relating to waivers. As a matter of fact, Judge Paulo is not enrolled to practice before the Treasury Department. A photostatic copy of a telegram from the Internal Revenue Service stating this fact is attached hereto as "Exhibit A" and made a part hereof.

6. It is conceded in the affidavit of John Foley that after an interest was manifested in my own tax matter, the activity of Judge Paulo was restricted to telephone conversations initiated by Foley. Judge Paulo stated in his affidavit that with the possible exception of the purely ministerial act in relation to the waivers, Mr. Mack was in complete charge of my income tax matter and that all inquiries were promptly referred to Mack. It is my recollection that I never discussed waivers with Foley by telephone or otherwise.

7. From the time I retained him, William Mack was in complete charge of my income tax case and met with agents and representatives of the Internal Revenue Service on numerous occasions in connection therewith. At no time, as his affidavit indicates, was Judge Paulo ever present at any meeting in relation to my income tax case. With the exception of my appearance at 253 Broadway in the early part of 1955, I was never present at any conference in relation to my own income tax case, either.

8. The peculiar and startling role of William Mack in the entire matter of my own income tax returns gives rise to certain inescapable inferences. The agents of the

Internal Revenue Service [110] knew that Mr. Mack was not enrolled or permitted to practice before them. They also knew that he had not filed a power of attorney. The violations of statute, regulation and practice requirements were manifest. As it now appears, they procured Mr. Mack to prepare various documents, records, work sheets, analyses and even a statement of net worth and cost of living. Mr. Mack diligently performed these "errands" for the agents on more than one occasion. Having recognized the general incompetence and legal disqualification of Mr. Mack, they seized upon him as a rare source and conduit of information. In a statement under oath procured by the agents of the Internal Revenue Service themselves, Mr. Mack described how he performed these services for the agents and enumerates papers he prepared for them. Mr. Mack then swears that at no time did I inspect the papers prepared by him.

9. In July 1954, when I received the letter from the District Director of Internal Revenue, bearing numerous indications that the examination then being conducted was directed toward a civil settlement, Mr. Mack had already been engaged in his activities with agents of the Internal Revenue Service for a period of about one year and had already had, as he told me, numerous meetings with the agents, having as a subject of his discussion with them the civil settlement of my own tax matter.

10. From the affidavits of John Foley, sworn to February 21, 1956, and Morris Skolnick, sworn to February 23, 1956, submitted in opposition to this proceeding, it appears conclusively that my entire tax matter was truly a joint investigation from the middle of 1952. In fact, the date Mr. Skolnick, the Special Agent, gives for his assignment, the exact nature of which is not divulged, is vaguely fixed as the early part of 1952, while the Revenue

Agent states that the date of his [111] assignment was in September 1952. It thus conclusively appears without the possibility of contradiction that despite attempts to give their investigation of my tax returns an innocuous appearance, Mr. Skolnick was at all times engaged in performing his duty of preparing and collecting evidence to support a criminal charge against me.

11. It is interesting to note, that although I appeared before Mr. Skolnick in connection with the tax returns of others in May 1953, Mr. Skolnick had made no alleged contact with any insurance company concerning my income until August 1953, almost a year after it is conceded that a Special Agent and a Revenue Agent were in the case and months after William Mack undertook to represent me. Thus, it appears that no move was made in connection with the circularization of possible sources of my income until after Mack had embarked on his course of providing information in response to every whim and demand of the Special Agent acting through the Revenue Agent.

12. The present claim of Skolnick that his investigation was based on disclosures made by me prior to Mack's entry into the case is patently insubstantial. I reaffirm it as my recollection that my first conversation with Skolnick took place in the County Clerk's office and library in Staten Island and that our conversation related solely and exclusively to the tax returns of others, in the preparation of which I had assisted. It is further my recollection that there was no conversation whatsoever relating to my own income tax. The interrogation of me in Mr. Skolnick's office in May 1953 related only in the most passing and introductory way to my own personal matters and out of a total stenographic transcript of 22 pages, it may be said that only 2 pages

might be construed as referring to my personal matter. The examination substantially and in its essence was directed to the matter of my preparation of the income tax returns of others.

[113] 13. Certain broad issues of fact are created by the affidavits in this proceeding but it cannot be denied that the basic allegations in this petition are substantiated by the affidavits submitted in opposition thereto. It is quite clear that Foley and later Ginnane were Revenue Agents working under the direction and control of Special Agent Skolnick who was involved in the case from the very outset and who was directing his efforts to obtaining evidence to support a criminal charge against me. It is clear that while well aware of the illegality of Mack's representation of me, the agents joined in these acts. It is also to be seen that the true nature of their activities was cloaked with the appearance of a routine audit.

WHEREFORE, your deponent respectfully prays that an order be made suppressing evidence, etc. as prayed for in the petition herein, or in the alternative, directing that a hearing be held to determine the issues of fact.

(Sworn to by James D. Russo, Feb. 28, 1956.)

Exhibit A, Annexed to Foregoing Affidavit of James D. Russo.

[113]

WESTERN UNION

TELEGRAM

1956 Feb 23 P M 5 0

WU 083 30 1 Extra Collect = WUX Washington DC 23 423 PME = Corcoran Kostelanetz and Gladstone = 52 Wall St New York NY =

RE YOUR TEL RECORDS OF THIS OFFICE DO NOT SHOW THAT FRANK D PAULO STATEN ISLAND N Y HAS EVER BEEN ENROLLED TO PRACTICE BEFORE THE TREASURY DEPARTMENT =
GEORGE C LEA DIRECTOR OF PRACTICE =

Opinion by Rayfiel, J.

[M4]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Appearances:

Corcoran, Kostelanetz & Gladstone, attorneys for petitioner; by Boris Kostelanetz, Esq.

Leonard P. Moore, United States Attorney, with Kenneth C. Sternberg and Zachary Fromberg, Assistant United States Attorneys, in opposition.

RAYFIEL, J.:

The petitioner has made two motions. In the first, brought under Rule 41(e) of the Federal Rules of Criminal Procedure, he seeks an order (1) declaring unreasonable, illegal and void the search and seizure made herein, (2) directing the return of his books, records, etc., in the possession of the Government agents, (3) suppressing all such books, memoranda and documents, etc., and (4) directing that a hearing be held and evidence be adduced respecting the issues raised by the motion. In the second, made while the first was under consideration, the petitioner asks, pursuant to Rule 26 of the Federal Rules of Civil Procedure, for an order granting leave to take the deposition of one William Mack.

[115] Since the argument of said motions the petitioner has been indicated, charged with violations of Sections 145(b) and 3793 (b) (1) of Title 26 of the United States Code.

From the papers submitted the following appear to be the facts: the petitioner is an assistant clerk in the office of the Clerk of the County of Richmond. In addi-

tion, he conducted an insurance brokerage business and prepared income tax returns for other persons. On June 23, 1952, one Morris Skolnick, a Special Agent of the Internal Revenue Service, who has been assigned to the investigation of a number of tax returns prepared by the petitioner for others, telephoned him, requesting that he come to the office of the Intelligence Unit of the Internal Revenue Service, at 253 Broadway, New York City. He informed Skolnick that it would be inconvenient for him to leave his place of employment, and accordingly Skolnick made arrangements to meet him at the County Clerk's Office in Richmond. On June 26, 1952, Skolnick and the petitioner conferred in the library of the County Court House in Richmond County. It was then that the petitioner told Skolnick that in addition to his employment in the Richmond County Clerk's Office he conducted an insurance brokerage business and prepared income tax returns for other persons. The petitioner promised to give Skolnick a list of the persons for whom he had prepared tax returns. He described his insurance business generally, giving the Agent the names of some of the companies with which he had done business. On July 3, 1952, petitioner [146] telephoned Skolnick, informing him that the list was almost completed, and that he wished to submit it in person. On July 8, 1952, petitioner called at Skolnick's office and gave him a list containing seventy-five names (presumably of persons whose tax returns he had prepared). He also supplied the names of two banks in which he had checking accounts. On February 10, 1953, one Frank D. Paulo, Esq., an attorney, telephoned Skolnick, and advised him that he had been retained to represent the petitioner. Later, on May 6, 1953, the petitioner called Skolnick, told him that he had retained Mr. Paulo to represent him, and suggested that Skolnick communicate with the attorney respecting a possible appoint-

ment for a conference. An appointment was arranged for May 19, 1953, at which time the petitioner appeared at the offices of the Intelligence Unit, at 253 Broadway, New York City, with Mr. Paulo. After the petitioner had consented to make a statement under oath, and after he had been advised that he had a right to decline to answer any questions which might tend to incriminate him, all this in the presence of his attorney, Mr. Paulo, he was interrogated by Skolnick, the questions and answers being recorded by a stenographer. A transcript of the record, some twenty-two pages in length, was prepared. It included, inter alia, a number of questions and answers relating to the petitioner's income, and the nature and extent of his business with various insurance companies during the years 1949, 1950 [117] and 1951. The petitioner gave Skolnick the names of seven insurance companies in whose behalf he had solicited business. Pursuant to an arrangement theretofore made Mr. Paulo returned to Skolnick's office on July 2, 1953, for the purpose of reading and signing the transcript of the petitioner's deposition. After both had read it the petitioner initialed each page and signed his name at the end thereof. After swearing to the truth thereof before Skolnick, a copy was given to the petitioner. In or about September, 1952, John Foley, a revenue agent, was assigned to examine the tax returns of the petitioner as well as those which he had prepared for other persons. In connection with these examinations Foley communicated with the petitioner, and was referred by him to Mr. Paulo, his attorney, who, in May, 1953, advised Foley that one William Mack, an accountant, who maintained offices in Richmond County, had been engaged by petitioner to assist him in connection with the examination of his tax returns. Mr. Mack, Mr. Paulo stated in his affidavit, had done accounting work for him and some of his clients. Subsequently Foley and Skolnick com-

municated with the petitioner and Mack in connection with their investigations. Foley obtained from Mack petitioner's books and records as well as certain work sheets which Mack had prepared. On December 16, 1954, petitioner and Mack appeared at Skolnick's office, and, although he informed the agent that he would not answer any [118] questions under oath, the petitioner was again interrogated, after having been advised of his rights.

Petitioner now seeks to suppress the evidence obtained by Skolnick and Foley on the ground that it was fraudulently and illegally obtained. He grounds his application chiefly, if not entirely, on the fact that Mack, the accountant designated by petitioner, and his then counsel, Mr. Paulo, were not admitted to practice before the United States Treasury Department, hence, were not qualified to represent him in the investigation then being conducted, and, therefore, that all of the proceedings had therein were tainted with illegality. That contention is impertinent to the issues herein and entirely without merit.

The petitioner cites the case of *U. S. v. Lipschitz*, 117 F. Supp. 466, in support of his motion to suppress. That case is clearly distinguishable from the instant case. In the *Lipschitz* case the *special agent*, during his investigation of the matter in preparation for criminal prosecution, directed the *revenue agent* to visit the offices of the taxpayer and obtain, without his consent or knowledge, information and excerpts from his books and records. In the instant case the special agent *himself* interviewed the petitioner and informed him as to his constitutional rights, one such interview being had in the presence of his counsel (Mr. Paulo), who thereafter returned with petitioner, who read the transcript thereof, [119] and then signed it in the presence of his counsel.

The case at bar almost parallels the case of *Turner v. U. S.*, 212 F. 2nd, 926, wherein the Court said, at page

931: "The relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute in this instance."

It has been expressly held time and again in tax evasion and other criminal cases that it is not essential to the admissibility of statements secured by officers of the law from a defendant that he should be first warned that the information might be used against him in a criminal case, *provided that it was voluntarily and understandingly given. United States v. Burdick*; 3 Cir. 214 F. 2d 768, 773; *Montgomery v. United States*, 5 Cir., 203 F. 2d 887, 892; *Lisansky v. United States*, 4 Cir., 31 F. 2d 846, 851, 67 A. L. R. 67; *Hanson v. United States*, 8 Cir., 186 F. 2d 61, 64; *Powers v. United States*, 223 U. S. 303, 32 S. Ct. 281, 56 L. Ed. 448; *Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090." (Italics added).

It is my opinion that the petitioner freely and voluntarily gave the information in question to Skolnick and Foley. He was represented by counsel at the time that many of the voluntary disclosures were made, a number of them before Mack came into the case. I am satisfied also that the information supplied by Mack was given with the consent, if not by the direction of the petitioner. His claim that, since [120] Mack was not admitted to practice before the Treasury Department, he did not have the authority to appear and act in his behalf, is, in my opinion, merely an expedient.

Accordingly, the first motion is in all respects denied.

As to the second motion, I find no sanction for it under the Rules. The motion to suppress was a miscellaneous proceeding, being neither civil nor criminal. Since the argument of the motion the petitioner has been indicted, and the matter is now a criminal proceeding. Inasmuch as provision is made in the Federal Rules of

Opinion by Rayfiel, J.

Criminal Procedure for the taking of depositions, Rule 26 of the Federal Rules of Civil Procedure, under which the second motion was made, is inapplicable. Nor does the examination of Mack, sought under said motion, appear to be authorized by Rule 15 of said criminal rules, which provides for the taking of depositions. There is no proof, or even indication, that Mack is a prospective witness; nor has it been established "that it is necessary to take his deposition in order to prevent a failure of justice."

The second motion is therefore denied.

Dated: June 27th, 1956.

(Sgd.) LEO F. RAYFIEL
United States District Judge

Notice of Appeal.

[121]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

NOTICE is hereby given that James D. Russo, the petitioner above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Leo F. Rayfiel, United States District Judge for the Eastern District of New York, dated June 27, 1956.

A. Denying petitioner's motion brought under Rule 41(e) of the Federal Rules of Criminal Procedure for an order

1. Declaring unreasonable, illegal and void the search and seizure made herein;

2. Directing the return of all books, papers, records, memoranda, extracts, notes and copies therefrom, other documents and all other property belonging to the above captioned petitioner taken by agents and representatives of the United States Government and now in the possession of the United States Attorney or other agents or representatives of the United States of America;

3. Directing that any and all of the aforesaid documents, books, papers, memoranda and all other property belonging to the above captioned petitioner be [122] suppressed and that the United States Attorney and all other agents of the Government be restrained and precluded from using any of said books, papers, records, memoranda, other documents and all other property belonging to the above captioned petitioner, or any information directly or indirectly obtained therefrom or by means thereof or as a result of examination and use thereof

and leads and clues revealed thereby and that all information disclosed to the Government or to its agents by the petitioner above captioned, or directly or indirectly obtained by the Government through or as a result of or derived from the use of such information, and all leads, clues and other evidence directly or indirectly obtained by or through or derived from or revealed by such information be suppressed and that the United States Attorney and all other agents or representatives of the United States Government be restrained from submitting same to a Grand Jury, from using same on any trial or for any other reason;

4. Directing that a hearing be held and that evidence may be adduced for the determination of issues of fact arising out of this motion; and

B. Denying petitioner's motion brought pursuant to Rule 26 of the Federal Rules of Civil Procedure, for an order granting leave to take the deposition of one William Mack, entered in this action on June 27, 1956.

Dated: July 5, 1956.

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FILED
JUN 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

..... TERM, 19.57

No. ~~1057~~ 163

JAMES D. RUSSO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

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No.

JAMES D. RUSSO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Eastern District of New York.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (App. 42a)* is reported at 19 F.R.D. 278 (E.D.N.Y. 1956). The opinion of the Court of Appeals for the Second Circuit is reported at 241 F. 2d 285 (2nd Cir. 1957).

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* Parenthetical appendix notations refer to Appendix in the Court of Appeals.

Jurisdiction

The appeal to the Court of Appeals for the Second Circuit was decided February 8, 1957. The petition for a rehearing was denied and the mandate issued on March 8, 1957. Copies of the opinion and order denying rehearing are appended to this petition in the Appendix at pages 27 and 32. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

Questions Presented

1. Whether the opinion of the Court of Appeals for the Second Circuit which conflicts with the holding of the Court of Appeals for the Ninth Circuit on constitutional issues, and which affirms the summary denial by the District Court of petitioner's motion to suppress evidence without benefit of hearing, or deposition for the purpose of resolving issues of fact, was error.

2. Whether the acts of a layman in purporting to represent a taxpayer in a criminal tax matter constitute the unlawful practice of law.

3. Whether the evidence, unlawfully acquired through the participation of government agents in the improper "representation" of petitioner by one who engaged in unlawful practice of law and appeared before the Treasury Department in violation of Federal Statute and Regulation, should have been suppressed.

4. Whether the acts of the agents in disguising the true nature and purpose of their criminal investigation and in using improper representation of the taxpayer for the furtherance of their purpose deprived the taxpayer of his constitutional rights under the Fourth and Fifth Amendments to the Constitution and his rights to counsel under the Constitution and Statute.

Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit arising out of the affirmance by that court of an order of the United States District Court for the Eastern District of New York denying petitioner's motion for an order suppressing certain evidence and the leads and clues obtained therefrom and directing the return of petitioner's papers, books, etc., as well as copies made therefrom. This petition also relates to the denial of a hearing below on the foregoing application and the denial of petitioner's motion for leave to take the deposition of William Mack, a person having intimate knowledge of facts upon which the application was based.

James D. Russo, the petitioner herein, is an assistant clerk in the office of the Clerk of the County of Richmond (App. 5a) and he has for some time prior to the instant proceeding tried to supplement his earnings by occasional insurance brokerage and by assisting various people in the preparation of their income tax returns (App. 5a, 19a, 22a).

In the late spring of 1953 agents of the Internal Revenue Service manifested their first interest in petitioner's personal books, records and income tax returns.

At this time Mr. Russo engaged one William Mack, who held himself out to be an accountant, to review his books and records for 1949, 1950 and 1951 (App. 6a, 33a, 34a). At this point Mr. Russo knew nothing of any criminal investigation of his own tax returns (App. 6a). Before Mack was engaged in the early part of 1953, he had never served Mr. Russo as accountant or in any other capacity and was engaged for the sole purpose of representing the taxpayer in the review of his own tax returns for the years 1949, 1950 and 1951 (App. 9a).

Mr. Russo delivered his records to Mack, which records consisted of cancelled checks, bank statements and the like (App. 6a). Throughout the latter part of 1953 and continuing through 1954 and the first part of 1955 Mack was ostensibly engaged in consultation with the agents of the Internal Revenue Service making arguments of law and fact and filing various papers on the matters, the exact nature and contents of which were unknown to Mr. Russo at the time (App. 7a, 12a). Mr. Russo was given to understand that Mack's job was to make a recomputation of his income and that the additional tax, if any, would in due course be determined (App. 7a).

This understanding of the nature of the investigation was given additional support and impetus on several occasions of which the record contains two outstanding examples. One such is the letter dated July 12, 1954, annexed as Exhibit A to the original affidavit of Mr. Russo (App. 15a *et seq.*) from the District Director of Internal Revenue. It will be seen that this letter was received in the midst of the examination and Mack's activity. This letter from the District Director directs that all replies be made to the Audit Division at 90 Church Street. It also directs the taxpayer to contact Internal Revenue Agent Thomas J. Ginnane should such contact be necessary.

The other example is Exhibit B annexed to the same affidavit (App. 17a) which is also signed by a person characterized as an Internal Revenue Agent and describes his activities as a tax examination. These two documents are entirely devoid of any mention of a Special Agent, throughout refer to their work in terms of "audit" or "examination," and nowhere do the words "investigation" or "fraud" appear. It is also noteworthy that the letter was sent from 90 Church Street rather than 253 Broadway, which was then well known as the headquarters of the special agents or "T" men. (The proper character of the examination as a joint fraud investigation supervised by

a special agent whose duty it is to gather proof to support a criminal charge of income tax evasion was by affirmatively deceptive techniques, obscured and disguised to give the appearance of a routine audit conducted by an Internal Revenue Agent whose duty it is to conduct ordinary tax examinations and make civil tax settlements in the case of underpayment. *Russo* v. *U. S.*, 241 F. 2d 285 (2nd Cir. 1957); Official Manual of the Internal Revenue Service; *U. S.* v. *Wolrich*, 129 F. Supp. 528 (S. D. N. Y. 1955).

During this time Mack was never required to exhibit a Treasury card (App. 8a); in fact, he was not entitled to practice before the Treasury Department, and was neither an attorney nor a certified public accountant (App. 10a). Nevertheless, he proceeded to deal with the agents in what Russo had supposed was an "audit" of the returns, which he represented would be followed by a settlement on the basis of a payment of a deficiency, if any were found. It was only subsequent to the completion of the agent's investigation that Mr. Russo learned that Skolnick was a special agent of the Internal Revenue Service and that he was conducting a joint investigation in which he was responsible for the procurement of proof to establish a criminal charge of income tax evasion against him. Mr. Russo never met with the agent during the period between June, 1953 and the early spring of 1955 (App. 9a), December 16, 1954, according to Skolnick (App. 25a).

The use by Special Agent Skolnick of Mack and of two Internal Revenue Agents as his foils was a skillful device to keep the true nature of his work from the taxpayer (App. 10a, 11a). The agent's use of Mack as co-investigator is demonstrated in the excerpt from the affidavit prepared for Mack by the special agent (App. 11a, 12a), in which Mack describes how, at the request of the agent, he analyzed the records, made up figures, summarized them on work sheets, and delivered his work sheets and analyses together with the checks, statements and other records of

the taxpayer to the agent. These were subsequently returned to Mack and later re-examined at Mack's office (App. 11a, 12a). The taxpayer never saw these papers (App. 7a, 8a, 12a).

Revenue Agent Foley confirms that he obtained Russo's books and records from Mack, as well as work sheets and analyses prepared by Mack (App. 19a). Among the information which Foley tells us that Mack gave him were "the names of insurance companies with whom Mr. Russo did business" (App. 21a).

Thus, the Special Agent-Revenue Agent team was in operation as early as September, 1952, according to the affidavits of Skolnick (App. 22a) and Foley (App. 19a). Mack joined their operation in the spring of 1953 (App. 34a). *The first contact with an insurance company was in August, 1953* (App. 25a), *almost a year after the joint investigation team was in operation and months after Mack undertook to represent Russo. The inference that Mack was the source of the information on which the agents acted is clear.*

In the spring of 1955, the taxpayer was directed to appear before Skolnick at 253 Broadway (App. 7a). Mack told Russo that he (Mack) should accompany him, and after their arrival Skolnick inquired whether Mack had a card authorizing him to practice before the Treasury Department. Mr. Mack said that he did not, that Skolnick knew he did not, and that in the light of Mack's extended handling of this case, Mack did not understand Skolnick's sudden concern at this time. Skolnick stated that Mack's lack of the Treasury card did not matter, and proceeded with the interrogation with by far the greater part of the questions being answered by Mack (App. 7a, 8a). This was the first time that Russo ever heard of the necessity for admission to practice before the Treasury, and Mack's disability in that regard (App. 8a). Mack argued many points of fact and law, the substance of which was not understood

by Mr. Russo (App. 8a). Subsequently, in September of 1955, for a reason the Government's answering affidavits did not choose to explain, Mack was called to the office of Special Agent Skolnick and at his behest executed an affidavit reporting his investigation of his own "client." (App. 8a-12a).

It is apparent from the affidavits of Skolnick and Foley (App. 19a, 22a) that Mr. Russo's matter was treated as a joint fraud investigation from September, 1952, but that affirmative steps were taken to give the proceeding the appearance of a routine audit. Mr. Russo did not at any time during the relevant parts of the investigation know that Mr. Skolnick was a Special Agent whose duty it was to gather evidence to support a criminal charge against him (App. 10a). Nor does it appear that Mack knew at any relevant time that Special Agent Skolnick had that as his purpose. It was apparently intended to avoid this realization by having receipts and letters signed by Internal Revenue Agents rather than by the Special Agent.

At no time was Mack authorized to deal with agents of the Treasury Department engaged in a criminal investigation, nor was he authorized to waive any of Russo's rights guaranteed to him as a private person under the Constitution (App. 10a; 11a).

It should be mentioned that in 1952 and prior to the investigation of petitioner's own return he was requested to assist Government agents to rectify errors which they said existed in certain income tax returns petitioner had prepared for others. Mr. Russo rendered such assistance and in the course thereof had counsel (App. 36a), who was not admitted to practice before the treasury (App. 41a). At the ostensible close of such investigation the counsel withdrew because he did not feel qualified to handle the tax matter (App. 34a, 36a) and Mr. Russo was thanked for his assistance (App. 6a).

REASONS FOR GRANTING THE WRIT

POINT I

The summary denial of petitioner's application without benefit of hearing or deposition despite the existence of issues of fact was error and in conflict with decision of Ninth Circuit.

The decision below should be reviewed because it erroneously affirmed the summary denial of petitioner's motion without benefit of hearing or deposition despite the existence of basic issues of fact and the lack of testimony of the principal witness.

In so doing, the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Heffritz v. United States*, 240 F. 2d 109 (9th Cir. 1956).

The most cursory reading of the record discloses that the Government's version of the transactions which took place during the periods which are relevant to petitioner's motion to suppress differs sharply from that of petitioner's.

Some of these issues are set forth below:

1. The petitioner characterizes his first contact with the Government agents as one related solely and entirely to the question of the income tax returns of other taxpayers (App. 5a, 6a, 39a). Skolnick describes an entirely different meeting in which it is claimed that matters pertaining to Mr. Russo's personal income tax were discussed (App. 22a). Mr. Russo subsequently reaffirmed his version of the meeting as originally stated (App. 39a). There is a sharp issue as to the basic nature and origination of the investigation raised by the affidavits of Russo and Skolnick. The affirmed opinion of the District Court follows Skolnick's version (App. 43a) having decided this issue without benefit of a hearing.

2. Although Mr. Russo swears that he had no knowledge of the true identity or purpose of Skolnick until virtually years later (App. 10a) Skolnick apparently makes an oblique claim that he disclosed his true identity by mention of the Intelligence Division at the very outset (App. 12a). The District Court adopts the Government's version (App. 43a).

3. Petitioner's version notes only a fleeting presence in a prior transaction of a lawyer, not admitted to practice before the Treasury Department, to represent him, such representation having existed only in relation to this other matter (App. 33a-37a). But the Government urges that appropriate representation was present wherever necessary (App. 19a, 26a). The District Court adopted the Government's version (App. 45a).

4. It is petitioner's version that Mack was the conduit through whom the Agent surreptitiously, illegally and unconstitutionally obtained evidence (App. 6a-14a) while the affidavit of Skolnick urges that the bulk of the information was acquired from Mr. Russo prior to Mack's appearance in the matter (App. 22a-24a). The significance of Mack as a conduit for information is manifestly of primary importance and it is to be pointed out that the affidavit of Internal Revenue Agent, John Foley (App. 19a, *et seq.*) supports petitioner's view that Mack was in fact the medium utilized by the Internal Revenue and Special Agents. Having acquired the evidence through Mack, the fact that Skolnick may have been able to acquire the evidence in a legal manner is, of course, irrelevant, *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 64 L. Ed. 319 (1920).

5. If, as it is claimed by Skolnick (App. 22a-24a) all the relevant information was obtained prior to Mack's appearance, how does it happen that no circularization of

income sources was made until August of 1953, long after Mr. Mack appeared on the scene (App. 25a)?

6. Petitioner has characterized the entire transaction as a joint fraud investigation from the very outset. According to the Official Manual of the Internal Revenue Service such a joint investigation is carried on by a Special Agent who is responsible for the procurement of proper proof to establish a criminal charge, in conjunction with an Internal Revenue Agent, who is responsible for the audit features of the case. But the record discloses (App. 15a) a letter from an Internal Revenue Agent in July, 1954, indicating a normal routine civil audit. If, as late as July, 1954, this were merely a routine audit (which type of audit is normally carried on solely by an Internal Revenue Agent, *U. S. v. Wolrich*, 129 F. Supp. 528 (S. D. N. Y., 1955), how does it happen that almost a year earlier Skolnick, a Special Agent, called upon insurance companies to learn the volume of business the petitioner personally did with them (App. 25a)? This internal contradiction casts serious and fundamental doubt upon the practice of the Internal Revenue Service of using innocuous appearing letters from the Audit Division to conceal the activities of a Special Agent in the Intelligence Division.

7. Petitioner has described his appearance with Mr. Mack at Skolnick's office toward the end of the investigation and relates the vital and interesting conversation which took place between Mack and Skolnick with reference to Mack's lack of a Treasury Card showing admission to practice before the Treasury Department (App. 7a, 8a). Skolnick categorically denies that this conversation took place (App. 26a). Despite this sharp conflict the District Court adopts the Government's version (App. 45a).

The motion to suppress was summarily denied without a hearing to resolve these issues of fact and without grant-

ing petitioner the opportunity to take the deposition of the principal witness in order to make his testimony available to the Court. The denial of a hearing was fatally prejudicial to the rights of the petitioner and was error. *Cheng-Wai* v. *U. S.*, 125 F. 2d 915 (2nd Cir. 1942); *U. S.* v. *Manno*, 118 F. Supp. 511 (N. D. Ill., 1954); see dissent of Judge Frank in *U. S. ex rel. Accardi* v. *Shaughnessy*, 206 F. 2d 897, 901 (2nd Cir. 1953) adopted by this Court in reversal, 347 U. S. 260, 97 L. Ed. 681 (1954). Petitioner was entitled to submit evidence and cross-examine witnesses. *Hoffritz* v. *U. S.*, 240 F. 2d 109 (9th Cir. 1956). The denial of petitioner's right to present evidence in support of his application to suppress and to cross-examine the witnesses of the Government in opposition to said application also violated the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure, which provides that the "judge shall receive evidence on any issue of fact necessary to the decision of the motion." *Hoffritz* v. *U. S.*, *supra*. It is fundamental that affidavits are not evidence and that Rule 41 contemplates evidence in its competent sense. *U. S.* v. *Warrington*, 17 F.R.D. 25, 28 (N. D. Cal. 1955).

Compounding the error in the summary resolution of factual issues against petitioner, the denial of a hearing created further prejudice since it deprived petitioner of the subpoena power without which he was unable to obtain the testimony of all the essential witnesses to the transactions complained of in the motion to suppress evidence. At the very time that petitioner was thus immobilized, the Government had available to it to secure testimony on its behalf the grand jury subpoena power and the subpoena powers of the Internal Revenue Service pursuant to the provisions of Sections 6001, 7602 and 7605 of the Internal Revenue Code of 1954; 26 U.S.C. 6001, 7602, 7605. This effect of deprivation of the subpoena power was a denial of due process to petitioner. *Cf. Gordon* v. *Boules*, 153 F. 2d 614 (Em. App. 1946), cert. den. 328 U. S. 858.

The Supreme Court of the United States and other Federal Courts have recently pointed out the necessity of a separate hearing on issues created by a motion to suppress, *Smith* v. *U. S.*, 348 U. S. 147, 151, 99 L. Ed. 192, 197 *et seq.* (1954); *U. S.* v. *Nardone*, 308 U. S. 338, 341, 84 L. Ed. 307, 312 (1939); *U. S.* v. *Manno*, 118 F. Supp. 511 (N. D. Ill. 1954); *U. S.* v. *Coplon*, 185 F. 2d 629, 639 (2nd Cir. 1950), cert. den. 342 U. S. 920; *Cheng Wai* v. *U. S.*, 125 F. 2d 915 (2nd Cir. 1942); cf. *U. S.* v. *Goldstein*, 120 F. 2d 485, 488 (2nd Cir. 1941), aff'd 316 U. S. 114; See *Marsh* v. *U. S.*, 29 F. 2d 172, 173 (2nd Cir. 1942). This view has the very practical basis that issues as fundamental as these should not be tried on affidavits, *Matthews* v. *Correa*, 135 F. 2d 534 (2nd Cir. 1943). It is abundantly clear that where no consent to have the issues determined on the basis of affidavits alone may be inferred, a hearing should be granted, *Hoffritz* v. *U. S.*, 240 F. 2d 109 (9th Cir. 1956); *Lapides* v. *U. S.*, 215 F. 2d 253 (2nd Cir. 1954); *Reszitek* v. *U. S.*, 147 F. 2d 142 (2nd Cir. 1945); *U. S.* v. *Lipshitz*, 117 F. Supp. 466 (E. D. N. Y. 1954)

The failure to grant a hearing also effected a denial of due process to the appellant under the Fifth Amendment to the Constitution, since due process required that the appellant have an opportunity to be heard, to have witnesses on his behalf, to have the right to the subpoena power in order to obtain witnesses, and to have the opportunity to cross examine the witnesses testifying in opposition. *Gordon* v. *Bowles*, 153 F. 2d 614 (Em. App. 1946), cert. den. 328 U. S. 858; *U. S.* v. *Dollar*, 100 F. Supp. 881 (N. D. Cal. 1951), rev'd on other grounds, 196 F. 2d 551; cf. *U. S.* v. *Dillman*, 146 F. 2d 572 (5th Cir. 1945); cf. *Kansas* v. *Occidental Life Ins. Co.*, 89 F. 2d 935 (10th Cir. 1938); cf. *Rosenblum* v. *Rosenblum*, 42 N.Y.S. 2d 626, 629, 630 (Sup. N. Y. 1943).

This right to a hearing is imperative and it would not matter that Rule 41e, ~~Fed. R. Crim. P.~~, does not specifically require that a hearing be held since the right to a hearing

is constitutional. cf. *Clarksburg-Columbus Co. v. Woodring*, 89 F. 2d 788, 790 (App. D. C. 1937), rev'd, 302 U. S. 658, on grounds case became moot.

Accordingly, issues of fact having been presented, the Court below erred in failing to require a hearing.

Despite petitioner's motion therefor, the District Court failed to require, at a hearing or on deposition, testimony of one William Mack, the man who played the central role in the transactions which gave rise to petitioner's motion to suppress. The District Court refused to permit the deposition on the ground that same was not available in a special proceeding of this nature where an indictment had been found even though subsequent to the institution of the proceeding. While the Court of Appeals reversed this erroneous conclusion of law, holding that this proceeding is a civil action in nature, the Court of Appeals nevertheless did not upset the refusal to permit the deposition.

POINT II

The acts of Mack and the agents of the Treasury Department violated both state and federal law, and the evidence should have been suppressed.

A. The practice before the Treasury Department by Mack and the participation therein by the agents violated the provisions of 5 U.S.C. 261 and the Regulations laid down by the Secretary of the Treasury pursuant thereto.

The Congress of the United States has provided for the establishment of rules and regulations by the Secretary of the Treasury governing recognition, qualifications and enrollment for practice before the Treasury Department. 5 U. S. C. 261, July 7, 1884, c. 334, Sec. 3.23, stat. 258. Congress had provided that as a prerequisite to enrollment and recognition, an applicant show that he is of good character and in good repute, possessed of the necessary qualifications to enable him to render valuable service,

and otherwise competent to advise and assist in the presentation of cases, 5 U. S. C. 261.

Pursuant to the mandate of Congress, a lengthy regulation, embodied in Circular 230, was promulgated, establishing stringent requirements for admission to practice and a puritan code of conduct while enrolled. Reg. Sec. 10.2 et seq. The regulation provides that no one shall be eligible to practice before the Treasury Department unless found qualified and enrolled in accordance with the regulations. Reg. Sec. 10.2. The scope of permitted practice is deemed by the regulation to comprehend all matters connected with the presentation of a client's interest to the Treasury Department, including the preparation and filing of necessary written documents, correspondence with the Treasury Department relative to such interest, as well as the other functions performed by a duly accredited representative. Reg. Sec. 10.2(b).

In the instant matter Mack was engaged solely and uniquely for the purpose of this representation and practice and had never performed any services for the taxpayer prior to this engagement (App. 9a). He purported to perform the services of a duly accredited, enrolled representative to the extent of filing papers, conducting negotiations and urging, as advocate, issues of law and fact for the purpose of obtaining a particular determination by the agents and representatives of the Treasury Department (App. 7a, 11a). Mack's basic disability was known to the agents of the Treasury Department at all times (App. 7a, 10a). His acts as a purported representative thus violated the policy and regulation of the Secretary of the Treasury and were an evasion of the thrust of the statute.

In dealing with the individual known to them to be unenrolled and incompetent, under the law and regulations it would appear that the agents acted contrary to the Congressional mandate embodied in 5 U. S. C. 261, violated the provisions of Circular 230, as amended, and the

Bureau's "Rules of Conduct and Other Instructions for Employees of the Internal Revenue Service."

This utter lack of authority and knowledgeable disregard thereof by the agents is demonstrated by the violation by both Mack and the agents of the provisions of Sections I and II of the Bureau's *Conference and Practice Requirements*, 26 C. F. R. 601.4(d) (1949 Edition). Section II thereof provides:

> "No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney or certified copy thereof from his principal in proper form authorizing him to prosecute the case, claim or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. * * *"

Since Mr. Mack was not enrolled, no power of attorney was ever filed nor was evidence of enrollment ever submitted.

The conduct of which petitioner complains is precisely that against which the rules and regulations, laid down with such great care and deliberation, are directed.

B. The disclosure of information to Mack by agents of the Treasury in the course of dealing with him violated the provisions of 18 U. S. C. 1905, 26 U. S. C. 7213, and of the Treasury regulations.

Congress has enacted a stringent and all-pervasive statute whose effect is to prohibit the agents of the Treasury from divulging, disclosing or in any manner making known any information acquired by them in the course

of their official duties and which relates to the amount or source of any income of any person, or permitting any income return or copy thereof, or any book containing any particulars thereof to be seen by any person except as provided by law. 18 U. S. C. Sec. 1905. Violation of this statute by the agents is a crime punishable by fine or imprisonment, or both, as well as by removal from employment. The substance of this portion of the Criminal Code is repeated in the Internal Revenue Code of 1954, Section 7213, 26 U. S. C. 7213.

The exchange of information by the agents and Mack, their discussions with him and their other dealings with Mack, who was both unauthorized and unenrolled to practice before the Treasury Department, constitute a violation of the foregoing statutory inhibition upon such agents against the unauthorized disclosure of information in any manner obtained by them to any other person, except as provided by law.

C. The practice of Mr. Mack before the Treasury Department and the participation therein by the agents was a crime under the provisions of New York Penal Law, Sections 270, 272, 1936 and 1937.

The controversy surrounding the propriety of practice by professional people other than attorneys before the Treasury Department rages. (See address of Erwin Griswold, Dean, Harvard Law School, before Convention of American Bar Association, Philadelphia, Pa., August 26, 1955.) The problem of the proper delineation of the tax functions of attorney and certified public accountant may not yet be solved but it has never been contended that one not qualified pursuant to Circular 230 should be permitted to practice at all. The acts of the unenrolled individual in the instant case, are as a matter of law illegal and constitute a violation of the Penal Law of the State of New York.

It is well established that the practice of the law is governed in every jurisdiction by local statutory provisions and compliance therewith is a prerequisite to practice in that jurisdiction. *Bar Association* v. *Dench*, 124 F. Supp. 257 (Virgin Islands 1953).

The New York State Legislature has forbidden the unlawful practice of law (N. Y. Penal Law, Sec. 270) and has made such unlawful practice a misdemeanor (N. Y. Penal Law, Sec. 272). Violation is punishable by imprisonment and fine or both (N. Y. Penal Law, Sec. 1937); *People* v. *Collins*, 271 App. Div. 511, 67 N.Y.S. 2d 53 (1st Dept. 1946). While the performance of incidental tax functions by the accountant regularly and customarily employed by a taxpayer may not, as a matter of business practicality, constitute a violation of the New York statute, it is no longer open to question that the special rendition of professional tax services by one not admitted to the bar does violate the statute when the engagement for the rendition of the services relates to a special matter and is not part of the regular course of accounting services extended by the accountant to the taxpayer in the conduct of his day-to-day business. *In re Bercu*, 273 App. Div. 524, 78 N.Y.S. 2d 209 (1st Dept. 1948), aff'd 299 N. Y. 728. Thus, where as here the taxpayers seeks outside tax assistance from one other than his regular accountant, the statute, the cases, as well as considerations of public protection, require that such person be admitted to practice before the bar. In such situation it would not matter whether or not the person were in fact enrolled before the Treasury Department This rule would seem to have "*a fortiori*" application in a criminal case. The Council of the American Institute of Accountants and the Board of Governors and House of Delegates of the American Bar Association issued a "Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation." This declaration appears in full, among other places, in 40 A. B. A. Jour. 968 iii, *et seq.* (November, 1954). Section 9 of the statement clearly and unambigu-

ously excludes accountants from the "criminal" area of tax practice. The Treasury Department has adopted this view. Interpretation of Section 10.2 of Treasury Department Circular 230.4 P-H Federal Taxes (1956), par. 76,330.

In an affidavit prepared for Mack's signature by Special Agent Skolnick (App. 9a-12a), Mack swore that the taxpayer retained him as an accountant especially for the purpose of representing him in the instant matter. He stated further that "prior to this time I did not do any accounting work for Russo." The facts of this case, therefore, fall squarely within the interdiction of the Appellate Division for the First Department as affirmed by the Court of Appeals of the State of New York in *In re Bercu, supra.*

The Courts in other jurisdictions have passed in excellently reasoned opinions on parallel situations. Even where the "representative" was a certified public accountant, qualified and has been enrolled to practice before the Treasury Department, their acts have been condemned under a rule far more stringent than that which obtains in the State of New York. *Agran* v. *Shapiro*, 127 A.C.A. Supp. 129, 273 P. 2d 619 (Cal. App. 1954); *Gardner* v. *Conway*, 234 Minn. 468 N. W. 2d 788 (Minn. 1951).

These illegal acts, as a matter of fact, were joined in by the agents of the Treasury Department who knew at all times the true status of Mack as an individual unenrolled to practice before the Treasury Department. This is apparent from the failure of Mack to file powers of attorney as required by Circular 230 and the Conference and Practice Regulations. They also knew that Mack was retained specifically for the purpose of this tax investigation since this information appears in the affidavit drawn by Special Agent Skolnick for Mack's signature under oath. Under the provisions of Section 1936 of the New York Penal Law, any person who aided or abetted Mack in his criminal acts is also guilty of a crime punishable under the provisions of the New York Penal Law, Section 1937.

D. The foregoing violations of law render the evidence, clues and leads therefrom and all other evidence obtained thereby a nullity, and results in its disqualification as a matter of law.

In dealing with materials, documents, admissions and other evidentiary matters which have been obtained by means of, or as a result of an illegal act, the Courts have decided that the most effective weapon for treating such matter, both in a specific case and as a means of deterring acts of that nature in the future, is the disqualification of the material in question. By thus eliminating incentive, it is thought that the illegal acts themselves will cease to take place. *U. S.* v. *Coplon*, 185 F. 2d 629, 639 (2nd Cir. 1950), cert. den. 342 U. S. 920.

This rule has been applied not only in cases involving a violation of Constitutional rights, *Boyd* v. *United States*, 116 U. S. 616, 29 L. Ed. 746 (1886); *Weeks* v. *United States*, 232 U. S. 383, 58 L. Ed. 652 (1914), but as well in cases where the illegal act involved doing a thing prohibited by statute or rule. *Rea* v. *United States*, 350 U. S. 214, 100 L. Ed. 233 (1956); *Nardone* v. *United States*, 308 U. S. 338, 84 L. Ed. 307 (1939); *U. S.* v. *Coplon*, *supra*.

In the *Rea* case, the Supreme Court of the United States suppressed evidence gathered in violation of law and enjoined its use, stating:

> "* * * (The federal rules) * * * are designed as standards for federal agents. * * * Federal courts sit to enforce federal law; * * * The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards of law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can

flout them and use the fruits of his unlawful act either in federal or state proceedings." (100 L. Ed. 233 at 216.)

The questioned act in the instant matter is the representation of the taxpayer and practice before the Treasury Department in violation of federal statute, regulation and the New York State Penal Law. These questioned acts were joined in by the agents who dealt with the unenrolled individual in full knowledge of the true facts.

In so far as this case presents the issue of an unenrolled, unqualified individual who purports to act as something entirely different with the connivance or consent of the Government agency, it bears striking similarity to cases in which the Supreme Court and other federal courts have struck down evidence obtained by one who assumed one identity but was in fact something entirely different. *Gouled* v. *United States*, 225 U. S. 298, 65 L. Ed. 647 (1921); *Fraternal Order of Eagles* v. *United States*, 57 F. 2d 93 (3rd Cir. 1932).

Because the evidence was acquired by means of violations of law and regulations, the motion to suppress should have been granted.

POINT III

The acts of the agents deprived the taxpayer of his rights under the Fourth and Fifth Amendments to the Constitution and of his right to counsel under Constitution and statute.

The acts of the Government agents in disguising the true nature and purpose of their criminal investigation and in using improper representation of the taxpayer for the furtherance of their purpose, deprived the taxpayer of his constitutional rights under the Fourth and Fifth Amendments of the Constitution and his rights to counsel under both Constitution and statute.

It appears that the Special Agent and Revenue Agents conducted a joint investigation of petitioner's tax returns during the period involved. According to the Official Manual of Instructions of the Internal Revenue Service, the function of the Special Agent in the "joint investigation" was responsibility for the criminal features of the case and for the procurement of proper proof to establish a criminal charge. The Revenue Agent would, of course, only be responsible for the audit features of the case and for the preparation of the record of proof to support an ad valorem addition to the tax. *Russo* v. *U. S.*, 241 F. 2d 285 (2nd Cir. 1957); *U. S.* v. *Wolrich*, 129 F. Supp. 528 (S.D.N.Y., 1955). *U. S.* v. *Lipshitz*, 132 F. Supp. 519 (E.D.N.Y., 1955). The agents forwarded their scheme by using innocuous appearing letters from the Audit Division of the District Director of Internal Revenue rather than from the Intelligence Division (15a, *et seq.*) and the careful deletion of any language indicative of the nature of their investigation from the receipt which they prepared for papers received from William Mack. No affidavit of the Revenue Agent who was caused to sign the seemingly harmless letter was ever before the Court.

The Supreme Court of the United States has been astute to strike down attempts of prosecuting officers and agents of the Government to obtain and use evidence under circumstances having a striking identity with those in the instant case. In *Gouled* v. *United States*, 255 U. S. 298, 65 L. Ed. 647 (1921), a business acquaintance of the defendant working under the direction of superior officers of the Intelligence Department of the Army obtained evidence against the defendant under the pretense of a friendly call. Here the agents of the Treasury used an accountant, named William Mack, in order to obtain evidence against Mr. Russo, evidence which they knew the accountant could easily obtain because of his "representation" of Russo. As in the *Gouled* case the petitioner did not know that his papers had been made available to the Government

for use as evidence against him in a criminal prosecution. It is no longer subject to doubt that evidence thus obtained by stealth, by dissimulation and disguise of purpose, instead of by force or coercion, does violence to the petitioner's constitutional rights. Mack, acting as a conduit of information, apparently played a key role in the consummation of Skolnick's scheme. Once aware of Mack's disabilities, they made ample and continuous use of him to the extent of having made him their deputy.

It is already the well-established law that disclosures obtained during a joint fraud investigation as a result of deception and enticing misrepresentations of the nature which took place here, condemn this whole proceeding as a violation of the rights of the taxpayer under the Fourth and Fifth Amendments to the Constitution. *United States* v. *Lipshitz*, 117 F. Supp. 466 (E.D.N.Y., 1954); *United States* v. *Wolrich*, 129 F. Supp. 528 (S.D.N.Y., 1955); *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D.N.Y., 1955); *United States* v. *Guerrina*, 112 F. Supp. 126 (E. D. Pa. 1954), re-argued 126 F. Supp. 609 (E. D. Pa. 1954); *Hanson* v. *United States*, 186 F. 2d 61 (8th Cir. 1950); *United States* v. *Manno*, 118 F. Supp. 511 (N. D. Ill. 1954); *United States* v. *Rackis*, 119 F. Supp. 687 (D. C. Mass. 954). These cases make it clear that the obtaining of evidence by a Revenue Agent who creates the impression that his activities are merely a routine audit but who is actually engaged in a joint fraud investigation is a violation of the taxpayer's constitutional rights and will give rise to an order suppressing the evidence.

In both the *Wolrich* and *Lipshitz* cases, the fruits of a joint fraud investigation was held subject to an order of suppression upon allegations that the Revenue Agent member of the team represented his activity as a normal routine audit and otherwise caused the taxpayer to believe that he was not engaged in collecting evidence for the purpose of supporting a criminal charge.

Disclosures in the course of a civil audit are obtained by invocation of the compulsion of statute which requires disclosure to Internal Revenue Agents acting in the normal course. Int. Rev. Code of 1939, Secs. 54, 3614, 3615; Int. Rev. Code of 1954, Secs. 6001, 7602, 7605. But consent under the circumstances of a joint fraud investigation is indeed a different matter. See *Nelson* v. *United States*, 208 F. 2d 505, App. D. C. 1953; A. J. Gould, 31 *Dicta* 325, 340 (1954).

So long as the Special Agent's true interest in Mr. Russo's personal returns remained undisclosed and the Revenue Agent's concealed the true nature of the investigation by means of their own identity as Internal Revenue Agents rather than as pawns for the Special Agent, any consent to the surrender of documents or disclosure of information must be deemed involuntary because of the aforesaid provisions of the Internal Revenue Code requiring such disclosures to Internal Revenue Agents conducting a routine audit. See *Union P. R. Co.* v. *P.S.C.*, 248 U. S. 67, 70, 63 L. Ed. 131 (1918); *U. S.* v. *Lantrip*, 74 F. Supp. 946, 949 (E. D. Ark. 1948) and cases cited therein.

Waiver is the intentional voluntary relinquishment of a known right. *Lehigh Valley R. Co.* v. *Ins. Co.*, 172 Fed. 364 (2nd Cir. 1909). The consent must be unequivocal and specific, freely and intelligently given. It is clear that waiver of constitutional rights is not lightly to be inferred, and the burden to show waiver is a heavy one resting on the Government. *Amos* v. *United States*, 255 U. S. 313, 65 L. Ed. 654 (1921); Cf. *Judd* v. *United States*, 190 F. 2d 649 (App. D. C. 1951). The law creates a strong presumption against the implication of waiver of fundamental rights, *Johnson* v. *U. S.*, 333 U. S. 10, 92 L. Ed. 346 (1947), and the withdrawal of the opportunity to choose invokes the presumption and dispels any factual inference of waiver. *U. S.* v. *Reckis*, 119 F. Supp. 687 (Mass. 1954).

A waiver may not be predicated on acts induced by deception and illegality. *United States* v. *Wolrich*, 129 F. Supp. 528 (S.D.N.Y. 1955); *United States* v. *Lipshitz*, 117 F. Supp. 466 (E.D.N.Y. 1954).

The standard of candor established by the charge to the jury approved by the Court of Appeals in *Hanson* v. *U. S.*, 186 F. 2d 61 (8th Cir. 1950) was never met.

Mack's activity in this case continued through and including the appearance of the taxpayer for formal interrogation at 253 Broadway. At this point, as at all other times, this improper representation of the taxpayer was known to the agents and was apparently used by them for the furtherance of their purpose. As a matter of long established law, the taxpayer is entitled to counsel at every stage of the proceeding. *Powell* v. *Alabama*, 287 U. S. 49, 77 L. Ed. 158 (1933); *Thomas* v. *Hunter*, 153 F. 2d 834 (10th Cir. 1946). And such representation must be effective representation. *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 (1938).

In the light of the so-called representation had there, it may well be argued that the proceedings was a farce. Through the acts of its agents, the Bureau committed the same error which a Judge would commit were he knowingly to permit a layman to advise one charged with a crime. The so-called representation of the taxpayer here was so lacking that it became the duty of the Department to recognize it and correct it. See *Diggs* v. *Welch*, 148 F. 2d 667, 670 (App. D. C. 1945).

The right to representation of one who is compelled to appear in person before a government agency or its representative is a right to be accompanied, represented and advised by counsel or other properly qualified and enrolled individual, such enrollment having been accomplished in accordance with the statute and regulations involved. Administrative Procedure Act, Sec. 5(a), 5 U.S.C. 1005(a). This is a requirement of proper and effective representation

when appearance before a Special Agent is enforced by the agency. *Torras* v. *Stradley*, 103 F. Supp. 737 (Ga. 1952); *United States* v. *Smith*, 87 F. Supp. 293 (Conn. 1949). These requirements were not met.

Nor can it be contended that the appellant has waived his right to counsel. Every reasonable presumption will be indulged against the waiver of such a fundamental right and acquiescence in the loss of such fundamental right will not be presumed. *Glasser* v. *United States*, 315 U. S. 60, 86 L. Ed. 680 (1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 82 L. Ed. 1461 (1938); *Butzman* v. *United States*, 205 F. 2d 343, 351 (6th Cir. 1953).

Conclusion

The denial of the application without a hearing and the refusal to allow petitioner the opportunity to examine William Mack were erroneous.

Both the acts of Mack and the Treasury Agents were illegal under federal and state law. This illegality rendered all the evidence and clues and leads obtained thereby a nullity and results in their disqualification.

The conduct of a joint fraud investigation in the deceptive guise of a routine audit was a violation of the taxpayer's constitutional rights under the Fourth and Fifth Amendments to the Constitution.

The participation of the agents in the purported representation of the taxpayer by one not admitted to practice before the Treasury Department violated the right to counsel as guaranteed by the Administrative Procedure Act and by the Constitution of the United States.

The foregoing illegality and unconstitutionality pervade the entire proceeding and render all the evidence and leads and clues therefrom subject to an order of suppression as prayed for in the order to show cause herein.

For the reason stated, the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

BORIS KOSTELANETZ,
Attorney for Petitioner.

CORCORAN, KOSTELANETZ & GLADSTONE,
JULES RITHOLZ, Esq.,
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 91—October Term, 1956.

(Argued January 7, 1957 Decided February 8, 1957)

DOCKET NO. 24193

IN THE MATTER

of

The Application of JAMES D. RUSSO, for an Order Declaring Unreasonable, Illegal and Void a Certain Search and Seizure, etc.

JAMES D. RUSSO,

Appellant,

THE UNITED STATES OF AMERICA,

Appellee.

Before: CLARK, Chief Judge,

LUMBARD and WATERMAN, Circuit Judges.

Before indictment, petitioner moved under Rule 41(e), Federal Rules of Criminal Procedure, to suppress evidence as illegally and unconstitutionally obtained from him by Treasury officials in an income tax investigation. He also moved to take the deposition of his accountant before the expiration of 20 days after the commencement of the action. The District Court for the Eastern District of New York, Rayfiel, D. J., denied both motions. 19 F.R.D. 278 (E.D.N.Y. 1956). Affirmed.

Appendix

CORCORAN, KOSTELANETZ & GLADSTONE, New York City (Boris Kostelanetz and Jules Ritholz, of counsel on the brief), for Appellant.

LEONARD P. MOORE, United States Attorney for the Eastern District of New York, Brooklyn, N. Y. (Kenneth C. Sternberg and Zachary Fromberg, Assistant United States Attorneys, of counsel on the brief), for Appellee.

LUMBARD, Circuit Judge:

James D. Russo appeals from the District Court's denial of two motions made before indictment: (1) under Rule 41(e), Federal Rules of Criminal Procedure, to suppress evidence because it was obtained in violation of the Fourth Amendment to the Constitution and the statutes governing Treasury Department practice; and (2) to take the deposition of his former accountant, Mack, within twenty days after commencement of the action, pursuant to Rule 26(a), Federal Rules of Civil Procedure.

Before the district court decision, an indictment was filed against Russo for attempted tax evasion and for assisting in the preparation of fraudulent tax returns of others. Internal Revenue Code of 1939, §§ 145(b), 3793(b)(1). On the basis of affidavits alone, Judge Rayfiel concluded (1) that the evidence had been voluntarily and legally disclosed; (2) that since an indictment had been filed, the Rules of Criminal Procedure governed and that under Rule 15(a) of those Rules no good ground for the deposition had been shown. Upon consideration of the facts as set out herein, we affirm the results below.

Russo, in addition to his regular employment as an assistant clerk in the office of the Clerk of the County of Richmond, prepared income tax returns and conducted an insurance brokerage business. During June and July 1952,

Skolnick, a Special Agent of the Internal Revenue Service[1] conferred with Russo in Staten Island and at Skolnick's office at the Intelligence Service headquarters. Although these meetings were largely in reference to the tax returns of others, apparently Russo's own returns were discussed as well.

In September 1952, Revenue Agent Foley[2] was assigned to examine Russo's own returns as well as those prepared by Russo for others. In early 1952, Russo retained as counsel one Frank D. Paulo from whom Foley obtained a waiver of the statute of limitations. In May 1953 Foley contacted Paulo in order to examine Russo's books; also in May, Skolnick had an interview with Russo at which Paulo was present. At this interview, Russo agreed to testify under oath and was probably told of his rights against self-incrimination, although at one time he denied this. Mack, an accountant, not authorized to practice before the Treasury Department, was retained by Russo at this time, with respect to the examination being made by Foley. A 22 page transcript of the interview was signed by Russo on July 2, 1953, which included some discussion of Russo's insurance business and Skolnick followed this up by contacting some of Russo's insurance companies in August 1953.

During this time, Foley was still trying to get Russo's records and at last on October 8, 1953 Paulo gave him permission to get Russo's records from Mack. Foley did get the records, and at Mack's request, returned them to Mack on November 23, 1953.

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[1] The Special Agent is in charge of criminal aspects of tax investigations, Manual of Instructions for Revenue Agents, Para. 678.

[2] A Revenue Agent is responsible for the auditing. Manual of Instructions for Revenue Agents, Para. 678.

What happened thereafter is not clear. Paulo evidently dropped out of the case by December 1954. Mack was apparently in frequent communication with the Treasury people, and in December 1954 or the spring of 1955—the affidavits conflict here—a conference involving Skolnick, Russo and Mack was held. This time Russo refused to testify under oath but did answer questions. In February 1956 the motions herein were filed.

The Suppression of Evidence

Russo's first contention is that the disclosures were not voluntary because the Treasury agents deceived him into thinking their examination was not for purposes of a criminal charge, but only for a routine civil audit. This seizure by deception is alleged to be a violation of the Fourth Amendment. We think there is nothing to this contention. Not only was there no evidence of any affirmative act of deception by Skolnick or Foley, but the record shows sufficient awareness by Russo that he was himself under investigation and of course this would include the possibility of criminal sanctions.

Russo argues, however, that the evidence came into the hands of the government by virtue of Mack's improper representation of him before the Treasury as Mack was not enrolled to practice before the Treasury. It was thus allegedly obtained in violation of Treasury Regulations. See 5 U.S.C.A. § 261, 26 C.F.R. 601.4(d) (1949 ed.). This contention is equally groundless, for whether or not Mack was technically admitted to Treasury practice, he was Russo's agent and could transmit information to the government in Russo's name. Treasury I. R. Mimeo. No. 58 (Com. No. 6) (1952). There is nothing in the affidavits to indicate that he was acting without Russo's authority. Moreover, it is clear that any evidence transmitted in 1953 was with the sanction of Russo's attorney, Paulo.

Since the voluntary nature of the disclosure is so clear from those portions of the affidavits which are undisputed, the district judge quite properly declined to take any further evidence at a hearing.

Mack's Deposition

Although we agree with the trial judge that there was no ground for taking Mack's deposition, the evidence being so clear, we cannot affirm his theory that the Rules of Criminal Procedure governed because an indictment was filed while the motion was pending. Having been filed before indictment, this proceeding was an independent civil proceeding and not merely preliminary to a criminal action. See *Lapides* v. *United States*, 215 F. 2d 253, 254 (2 Cir. 1954); *Weldon* v. *United States*, 196 F. 2d 874, 875 (9 Cir. 1952). Filing the indictment does not change the nature of the proceeding which is determined by the situation at its initiation. Cf. *United States* v. *Pellier*, 43 F. 2d 911 (2 Cir. 1930). Consequently Rule 26(a) of the Federal Rules of Civil Procedure is applicable, and not Rule 15(a) of the Rules of Criminal Procedure.

However, depositions before the expiration of twenty days after commencement of the action under Rule 26(a) are at the discretion of the court, and since it is clear from Judge Rayfiel's opinion that he considered the same factors as would be relevant under Rule 26(a) of the Civil Rules, see *Application of Russo*, 19 F.R.D. 278, 281 (E.D.N.Y. 1956), we see no reason to disturb his order. Moreover, as our disposition of the first motion indicates, we think the substantially undisputed facts in the affidavits are sufficient to dispose of the matter.

Order affirmed.

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER

of

The application of JAMES D. RUSSO, for an Order Declaring Unreasonable, Illegal and Void a Certain Search and Seizure, etc.

JAMES D. RUSSO,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

Before CLARK, Chief Judge, and LUMBARD and WATERMAN, Circuit Judges.

On Petition for Rehearing.

CORCORAN, KOSTELANETZ & GLADSTONE, New York City (BORIS KOSTELANETZ and JULES RITHOLZ, of counsel), for Appellant.

PER CURIAM.

Petition for rehearing denied.

C.E.C.,

J.E.L.,

S.R.W.,

U.S.C.J.J.

Filed March 8, 1957.

Appendix

Statutes and Regulations Involved

5 U.S.C. 261:

"*Rules for government of agents representing claimants.* The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents and attorneys before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.

"And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner wilfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement. (July 7, 1884, c. 334, Sec. 3, 23 Stat. 258.)"

18 U.S.C. 1905:

Sec. 1905. *Disclosure of confidential information generally.*

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made

by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. June 25, 1948, c. 645, 62 Stat. 791."

26 U.S.C. 7213:

Sec. 7213. *Unauthorized disclosure of information.*

(a) *Income returns.*

"(1) Federal employees and other persons. It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be

fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

New York Penal Law:

"Section 270. *Practicing or appearing as attorney at law without being admitted and registered.*

"It shall be unlawful for any natural person to practice or * * * to hold himself out to the public as being entitled to practice law * * * or in any other manner, or to assume to be an attorney or counselor-at-law, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation * * * and filed the same in the office of the clerk of the court of appeals as required by said section. * * * As amended, L. 1917, c. 783; L. 1939, c. 822, Sec. 1; eff. June 9, 1939."

"Sec. 272. *Violation of certain preceding sections a misdemeanor.*

"Any person violating the provisions of sections two hundred seventy * * * shall be guilty of a misdemeanor. * * *"

"Sec. 1936. *Punishment of accessory to misdemeanor.*

"When an act or omission is declared by statute to be a misdemeanor, * * * every person who aids, or abets another in such act or omission is also guilty of a misdemeanor."

"Sec. 1937. *Punishment of misdemeanors when not fixed by statute.*

"A person convicted of a crime declared to be a misdemeanor, * * * is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

Department Circular No. 230:

"Sec. 10.2 *Rules and regulations relating to practice* —(a) *Eligibility to practice.*—(1) No attorney or agent shall be eligible to practice before the Treasury Department unless such attorney or agent is enrolled in accordance with the regulations in this part or prior regulations, * * *"

"(b) *Scope of practice before the Department.*—Practice before the Treasury Department shall be deemed to comprehend all matters connected with the presentation of a client's interests to the Treasury Department, including the preparation and filing of necessary written documents, and correspondence with the Treasury Department relative to such interests. Unless otherwise stated the term 'Treasury Department' as used in this paragraph and elsewhere in this part includes any division, branch, bureau, office or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office or unit."

"Sec. 10.3(a)(3) Applicants for enrollment to practice before the Treasury Department are required by statute to 'show that they are of good character and in god repute, possessed of the necessary qualifications to enable them to render such claimants valuable service,

and otherwise competent to advise and assist such claimants in the presentation of their cases' (5 U. S. C. 261). The burden is upon applicants to establish clearly their right to enrollment by showing that they possess (i) a good character and reputation, (ii) an adequate education, and (iii) a knowledge of the laws and regulations relating to tax matters and other subjects which they expect to handle before the Department and of the rules and regulations governing practice before the Department."

"Sec. 10.6 *Roster of enrollees; enrollment cards*—(a) *Roster of attorneys and agents.*—A roster of all attorneys and agents who make application for enrollment or who are enrolled, or whose applications have been denied, or who have been suspended or disbarred, will be kept in the office of the Committee on Practice. All bureaus, offices and divisions of the Treasury Department * * * are prohibited from recognizing or dealing with any unenrolled attorney or agent as the representative of any person having a claim pending before the Department; * * * And provided further, That an unenrolled person who has not been disbarred or suspended from practice before the Treasury Department may be permitted to make initial appearance in a particular case. Such permission shall in no case authorize an unenrolled person to appear before the Treasury Department in Washington, D. C., or to represent a claimant in any formal hearing. It shall be the duty of the Government official before whom such person appears to notify him that if he wishes to appear further in the case, or in any formal hearing, or before the Treasury Department in Washington, it will be necessary to file an application for enrollment."

"(c) *Enrollment cards.*—The Committee on Practice shall issue an enrollment card to every attorney or agent upon his enrollment. Unless advised to the contrary by the Committee on Practice, any officer of the Treasury Department may consider the holder of such an enrollment card as duly authorized to practice before the Department."

"Conference and Practice Requirements (26 C.F.R. 601.4 [d]), 1949 Edition * * *

"b. No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form authorizing him to prosecute the case, claim or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference, who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a power of attorney in proper form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues raised or to any other matter relating to the taxpayer's case."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 163

JAMES D. RUSSO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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AUTHORITY

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In the

Supreme Court of the United States

Term, 19

No.

James D. Russo,

Petitioner,

against

United States of America,

Respondent.

PETITIONER'S REPLY BRIEF

This memorandum is submitted in support of the petition for a writ of certiorari herein and in reply to the Brief for the United States in Opposition.

POINT I

Contrary to respondent's position there are numerous issues of fact in the record which render the opinions of the Courts below erroneous in their failure to require a hearing.

A. The Record Does Disclose Affirmative Acts of Deception by the Government Agents.

Contrary to the assertions contained in the Brief of the Government in opposition to the instant petition (p. 8, *et seq.*) the record discloses patent documentary acts of deception in addition to those which are clearly described in the moving papers below and may be inferred from the course of conduct of the agents and the individual William Mack.

One such document is the letter dated July 12, 1954 (App. 15a, *et seq.*) from the District Director of Internal Revenue. Despite the fact, as is now known, that a joint fraud investigation was in progress, the agents contrived to have a letter from the office of the District Director of Internal Revenue sent to the subject of their investigation directing him to communicate with Internal Revenue Agent Thomas J. Ginnane and stating that the purpose therefor was the examination and audit of his returns. This routine type letter manifestly created the impression that an *Internal Revenue* Agent was conducting an examination rather than the true state of affairs, to wit, that a *Special* Agent was conducting a criminal investigation. The letter also requests that reply be addressed to the Audit Division and not to the Intelligence Division at a street address which was not then the Headquarters of the division of the Internal Revenue Service concerned with the investigation of tax fraud.

The atmosphere of a civil tax examination was again created by the manner in which an Internal Revenue Agent rather than a Special Agent prepared and executed a receipt for certain papers which had been delivered. In this receipt (App. 17a) the Revenue Agent referred to the proceeding as a tax examination rather than as an investigation or fraud investigation.

To this very last stage of the case, the respondent has never attempted to give any explanation concerning these documents.

Both these documents are devoid of any mention or indication of a Special Agent in the case or of the true nature of the endeavor of the agents. The distinction between the roles of an Internal Revenue Agent and a Special Agent is made clear in the Official Manual of the Internal Revenue Service and is noted in the opinion of the Court of Appeals in the instant case. *U. S.* v. *Wolrich*, 130 F. Supp. 528 (S.D.N.Y., 1955); *U. S.* v. *Lipshitz*, 132 F. Supp.

519 (E.D.N.Y. 1955). Disclosures in the course of a civil audit, which is the appearance given the investigation here, were compelled by statute. I.R.C. 1939, Sec. 3615; I.R.C., 1954, Sec. 7602 *et seq.*

Certainly many more glaring and patent instances of deception would appear in the record but for the denial in the District Court of petitioners' motion to examine William Mack before trial. This denial was characterized as erroneous by the Court of Appeals, and any hiatus in the record in that respect ought not be laid at the feet of petitioner. It hardly lies in the mouth of the government to belittle, from its position of strength, the unsuccessful efforts of petitioner to obtain Mack's testimony when the power to obtain and produce such testimony was available to the Internal Revenue Service throughout, I.R.C. 1954, Sec. 6001, 7602, 7605 and to the United States Attorney under Grand Jury subpoena powers.

B. There Was No Representation by Counsel in Relation to Petitioner's Personal Income Tax.

On the basis of the record, it is clear that the engagement of Frank Paulo, Esq. had a sole and exclusive relationship to the investigation of appellant's acts with respect to income tax returns which he had prepared for persons other than himself (App. 33a, 36a). Justice Paulo withdrew from the matter when it appeared that appellant's personal returns entered into the investigation (App. 34a) and properly so (App. 37a, 41a).

From the affidavit of Frank Paulo, now a sitting Justice of the Municipal Court of the City of New York, it is clear that any conclusion of fact that he gave permission to an agent to examine records would be incorrect (App. 34a, 35a). Justice Paulo states:

"7. Mr. Foley from time to time would make inquiries of your deponent as to when he could examine the books and records of Mr. Russo. His requests

would be referred to Mr. Mack. On two occasions Mr. Foley had spoken to your deponent about tax waivers which were forwarded to Mr. Foley from Mr. Russo through your deponent's office. There may have been occasions when your deponent notified Mr. Mack by telephone that Mr. Foley wanted to examine certain books or wanted certain papers in connection with his examination, but so far as your deponent is concerned, Mr. Mack was in complete and entire charge of the examination."

The finding of the Court of Appeals that Justice Paulo dropped out of the case by December 1954 (Pet., p. 30) differs from the record. Judge Paulo ascended the bench on May 18, 1954, some seven months prior to the date stated in the opinion (App., 33a). But much more important is the erroneous implication in the opinion that Justice Paulo played any part at all in the case of Russo's personal income tax returns. The affidavit of Justice Paulo is clear, however, that this is not the case:

"* * * Mr. John Foley, a representative of the Bureau, advised your deponent that he had been instructed to audit Mr. Russo's personal returns and his books and records. That later your deponent communicated this fact to Mr. Russo and arrangements were made whereby Mr. Russo engaged William Mack as an accountant with respect to the examination being made by Mr. Foley.

"6. Your deponent at no time thereafter, except for the instances that will hereinbelow be noted, did any of the work in connection with the examination of Mr. Russo's personal tax returns or books and records. Any conferences that were held with any representatives of the Bureau, with respect to the examinations, were with Mr. Mack. All work sheets prepared and other work done in connection with the examination of Mr. Russo's books and records were

done by Mr. Mack in conjunction with representatives of the Bureau. At no time was your deponent present at any of these conferences, nor did your deponent at any time inspect or see any of the work sheets prepared, nor did your deponent in any way take part in any of the examinations of Mr. Russo's personal tax returns or the presentation of Mr. Russo's case in connection with said returns. The reason for suggesting to Mr. Russo that he engage an accountant when your deponent was notified by Mr. Foley of the impending examination of Mr. Russo's personal tax returns and books and records was that your deponent did not possess the requisite accounting knowledge and, therefore, did not feel qualified to handle the matter." (App. 33a-34a)

Petitioner's evidence is to the same effect (App. 36a, 37a).

It is respectfully submitted that the sentence in the opinion of the Court of Appeals relating to Justice Paulo, stating, "Moreover it is clear that any evidence transmitted in 1953 was with the sanction of Russo's attorney, Paulo" is not established by the record, since Justice Paulo's affidavit states categorically:

"8. That as far as any disclosures made by Mr. Mack concerning Mr. Russo's affairs, deponent had no part in such disclosures in any manner. Your deponent was not present at any disclosures, and he did not supervise them.

"9. The retention of Mr. Mack by Mr. Russo did not involve Mr. Mack working under deponent's direction or supervision in any way, nor was he compensated by your deponent in any way. At the time Mr. Mack was not in any sense a part of deponent's office staff and had his own office at another address." (App. 35a.)

Since the affidavits of Justice Paulo and Revenue Agent Foley are inconsistent, it is apparent that the inconsistency should have been resolved at a hearing.

The opinion of the Court that disclosures were voluntary, in so far as it is based on a misapprehension that the appellant had the advice of counsel, is thus unwarranted by the record.

C. Petitioner Made No Voluntary Disclosures in Relation to His Personal Income Tax.

So long as the Special Agent's true interest in Mr. Russo's personal returns remained undisclosed and the Revenue Agents concealed the true nature of the investigation by means of their own identity as Internal Revenue Agents rather than as pawns for the Special Agent, any consent to the surrender of documents or disclosure of information must be deemed involuntary because of the provisions of the Internal Revenue Code requiring such disclosures to Internal Revenue Agents conducting a routine audit. Int. Rev. Code 1939, Sections 54, 3614, 3615; Int. Rev. Code, 1954, Sections 6001, 7602, 7605. Similarly, surrender of documents and disclosures elicited by means of a latent illegality will vitiate any superficial appearance of consent. Such surrender of documents and disclosure of information is deemed voluntary only in the same sense that the submission to the imminent assertion of the force of law or under circumstances appearing to be different from what they are, is consensual. *Union P. R. Co.* v. *P.S.C.*, 248 U. S. 67, 70, 63 L. Ed. 131 (1918); *U. S.* v. *Lantrip*, 74 F. Supp. 946, 949 (E. D. Ark. 1948) and cases cited therein; *U. S.* v. *Gross*, 137 F. Supp. 244 (S.D.N.Y., 1956).

As appears from the discussion on pages 23 *et seq.* of the petition herein it may not be contended that petitioner has waived his rights.

POINT II

The manifest illegality which permeates the conduct of Mack and the Government Agents is not relieved by I.R.-MIM. No. 58, relied on by respondent.

In the second point of the Brief in Opposition (pp. 10 *et seq.*) respondent doubts whether petitioner seriously urges that representation by counsel was inadequate because the attorney had no "treasury card." Of course, petitioner has never urged this and in so describing petitioner's argument respondent is indulging in the pastime of erecting and dismantling strawmen.

It has always been petitioner's argument that Justice Paulo's role related solely and exclusively to the matter of the returns prepared by petitioner for other taxpayers and not to the returns of petitioner himself. Petitioner has not claimed he was not adequately represented by counsel but that he was not represented by counsel at all, where here relevant. Justice Paulo's failure to have qualified for admission to practice before the Treasury Department and his incompetence to handle tax matters explain his withdrawal from petitioner's representation when an interest of the Internal Revenue Service in petitioner's own returns was first made manifest (App. 33a, 34a).

In any event respondent's failure to meet the briefed issue of illegality and its preference for expressing doubts about what petitioner seriously intends amounts to a confession of error in relation to the matter of the illegality which infected this investigation.

Petitioners position that illegality permeated this investigation is most seriously urged on pages 13 *et seq.* of the Petition.

Even if a mere administrative fiat were in any way binding upon this Court the I.R. Mimeograph relied upon by

the Government (Opp. Br. pp. 11 *et seq.*) does not contravene any position taken by petitioner. A reading of the portion of the mimeograph immediately preceding that quoted in the Government's Brief, but omitted by them, discloses that the dealings of the Agents with Mack were also prohibited by this regulation. The portion of the mimeograph omitted by the Government reads as follows:

> "* * * However, unless properly entrolled and authorized to represent the taxpayer before the Treasury Department with respect to the tax involved in the examination, such lawyer or accountant may not be heard as the taxpayer's representative in advocating, in those cases where issues or controversies have arisen out of the factual development of such cases, the adoption of any particular position with respect to such issues or controversies. In short, the difference may be summarized by distinguishing activities in the capacity of witness—or one who assists in the factual development of a case—and activities in the capacity of advocate—or one who acts in behalf of the taxpayer in urging a particular determination with respect to the issues or controversies which have arisen out of the factual development of a case * * *." I.R.-MIM. 58, 1952-2 Cum. Bull. 2-A P-H Fed. Tax Service Par. 21, 254-A.

Thus, since Mack was the appellant's representative in advocating the adoption of particular positions with respect to issues and controversies (App. 7a, 9a and 12a), then even under a view most favorable to the Government, the conduct of Mr. Mack and the Agent falls within every definition of forbidden practice.

Mr. Mack's conduct, even as described by him in an affidavit procured by Special Agent Skolnick, appears minimally to have consisted in obtaining information on behalf of the Revenue Service in support of a criminal

charge and without the knowledge of the appellant (App. 9a-12a). This is hardly the role of a witness contemplated in the mimeograph.

Conclusion

Respondent's position that there were no issues of fact in relation to the deceptive acts of Government Agents, the representation of petitioner by counsel and the nature and circumstances of petitioner's disclosure is contrary to the record.

The illegality permeating the investigation which petitioner seriously urges is not excused by any administration mimeograph.

Respectfully submitted,

BORIS KOSTELANETZ,
Attorney for Petitioner.

CORCORAN, KOSTELANETZ & GLADSTONE,
JULES RITHOLZ, Esq.,
of Counsel.

September 1957.

Office - Supreme Court, U.S.
FILED
JUL 29 1957
JOHN T. FEY, Clerk

No. 163

In the Supreme Court of the United States

OCTOBER TERM, 1957

JAMES D. RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 163

JAMES D. RUSSO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 42a-47a) is reported at 19 F. R. D. 278. The opinion of the Court of Appeals (Pet. App. 27-31) is reported at 241 F. 2d 285.

JURISDICTION

The opinion of the Court of Appeals was entered on February 8, 1957 (Pet. App. 27), and a petition for rehearing was denied on March 8, 1957 (Pet. App. 32). The petition for certiorari was filed on June 3, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether the District Court erred in denying, on the basis of affidavits and oral argument, petitioner's motion made prior to indictment for the return and the suppression as evidence of records allegedly obtained illegally by Treasury agents in the course of an income tax investigation.

RULE INVOLVED

Federal Rules of Criminal Procedure:

RULE 41. SEARCH AND SEIZURE

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or

trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On February 16, 1956, prior to indictment, petitioner moved the United States District Court for the Eastern District of New York, under Rule 41(e), Federal Rules of Criminal Procedure, for an order suppressing as evidence, directing the return of, and restraining the Government from presenting to a grand jury, statements and records allegedly obtained illegally by Treasury agents in the course of an investigation of his income tax liability. He requested a hearing for the purpose of taking testimony on issues of fact raised by the motion. (R. 2a-4a.) The motion, as amplified by the petitioner's accompanying affidavit (R. 5a-17a), alleged in substance that the agents obtained the evidence by fraud and trick in that petitioner was never advised that the investigation might lead to criminal prosecution but to the contrary was given to understand that the object of the investigation was to ascertain his correct civil tax liability; and that the evidence was further tainted with illegality in that neither the attorney nor the accountant who represented petitioner at various stages of the investigation was enrolled to practice before the Treasury Department which fact was known to the agents who, nevertheless, used the accountant as their (R. 12a) "willing tool * * * for the transmission of evidence * * * needed

by them in the preparation of the criminal charge * * *." In reply the Government filed the affidavits of the two Treasury agents who made the investigation and obtained the evidence in question (R. 19a-26a). After hearing argument on the motion, the court granted petitioner time in which to file a supplemental affidavit (R. 36a-41a) and the affidavit of his former attorney, Frank D. Paulo (R. 33a-35a).[1] Prior to a decision on the motion, an indictment was returned against petitioner, in the same court, charging violations of the revenue laws.[2] On June 27, 1956, the District Court, on the basis of the affidavits and oral argument, entered its findings and opinion denying the motion. (R. 42a-47a.)

The District Court's findings may be summarized, briefly, as follows:

Petitioner is employed as an assistant clerk in the office of the Clerk of Richmond County, New York. In addition, he has conducted an insurance brokerage business and has prepared income tax returns for other persons. (R. 42a-43a.)

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[1] On February 27, 1956, while the motion to suppress was pending, petitioner filed an application under Rule 26, Federal Rules of Civil Procedure, accompanied by an affidavit of his present counsel, Boris Kostelanetz, for leave to take the deposition, prior to the expiration of 20 days after the commencement of this proceeding, of one William Mack, who was petitioner's accountant during the period in question and who allegedly had knowledge of facts material to a decision on the motion to suppress (R. 30a-32a).

[2] The indictment charges that petitioner wilfully attempted to evade his income tax for the years 1949, 1950 and 1951, and that he wilfully aided and assisted in the preparation and filing of false and fraudulent income tax returns for others, in violation of Sections 145(b) and 3793(b), respectively, of the Internal Revenue Code of 1939.

On June 26, 1952, petitioner was interviewed (in the library of the Richmond County Court House) by Special Agent Skolnick, Intelligence Unit, Internal Revenue Service, who had under investigation a number of income tax returns prepared by petitioner for others. In the course of the interview, petitioner described his insurance business generally and gave the agent the names of some of the companies for which he solicited business. He also promised to submit to the agent the names of the persons whose income tax returns he prepared. Shortly thereafter, petitioner delivered this information to Skolnick, at which time he also gave Skolnick the names of two banks in which he had checking accounts. (R. 43a.)

In September 1952, petitioner's tax returns, as well as tax returns which he had prepared for others, were assigned to Revenue Agent Foley for investigation (R. 44a).

In February 1953, Frank D. Paulo, an attorney, telephoned Skolnick and stated that he had been retained to represent petitioner.[3] In May 1953, petitioner telephoned Skolnick and suggested that the latter contact Paulo with respect to arranging an interview. This the agent did. (R. 43a-44a.)

On May 19, 1953, petitioner appeared at the office of the Intelligence Unit, Internal Revenue Service, accompanied by his attorney, Paulo. After petitioner consented to make a statement under oath and after he was advised that he had a right to decline to answer

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[3] Although not included in the court's findings, it is undisputed that at the request of Revenue Agent Foley, Paulo, in February 1953, secured from petitioner and submitted to the agents a waiver extending the period of limitations with respect to petitioner's return for 1949 (R. 19a-20a, 34a-35a, 37a).

any question which might tend to incriminate him, he was questioned in the company of his attorney by Skolnick.[3] A number of the questions asked by Skolnick related to petitioner's income and to the nature and extent of his insurance brokerage business during the years 1949 through 1951. In this connection, petitioner, among other things, gave Skolnick the names of seven insurance companies with which he did business. The interview was recorded by a stenographer and transcribed. On July 2, 1953, petitioner, again accompanied by his attorney, Paulo, returned to Skolnick's office and after reading the transcribed statement, consisting of some twenty-two pages, he initialed each page, again swore to the truth of the statement and signed it. A copy of the statement was given to petitioner. (R. 44a.)

Shortly after the interview in May 1953, Revenue Agent Foley contacted Paulo and requested to see petitioner's books and records. He was advised by Paulo that William Mack, an accountant, had been engaged by petitioner to assemble and review his records for the years in question and that Mack would communicate with the agent when the records were assembled. Mack had performed Paulo's personal accounting work for many years; he also did accounting work for a number of Paulo's clients. After repeated requests of Paulo and Mack, the agents obtained petitioner's records from Mack in October 1953; Mack also turned over to the agents the work sheets which he had prepared from the records.[4] (R. 44a-45a.)

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[4] Although not spelled out in the court's findings, it is undisputed that the records in question consisted of bank statements, cancelled checks and check book stubs (R. 6a, 20a).

In December 1954, petitioner, accompanied by Mack, was again interviewed by Skolnick in the latter's office. On this occasion, petitioner declined to give a sworn statement but agreed to answer questions. At the outset of this interview, he was again advised that he need not answer any question which might tend to incriminate him. (R. 45a.)

The District Court noted (R. 45a) that petitioner's motion to suppress was grounded "chiefly, if not entirely, on the fact that Mack, the accountant designated by petitioner, and his then counsel, Mr. Paulo, were not admitted to practice before the United States Treasury Department, hence, were not qualified to represent him in the investigation then being conducted, and therefore, that all of the proceedings had therein were tainted with illegality." The court held that the fact that petitioner's representatives were not admitted to practice before the Treasury Department was not pertinent to the issues presented by the motion to suppress.

The District Court further stated that the critical inquiry is whether the taxpayer freely consented to the disclosures and that it is not essential to the admissibility of statements secured by government officials that the taxpayer be first warned that the information might be used against him in a criminal case "provided that it was voluntarily and understandingly given" (R. 46a). Applying these criteria to the facts disclosed by the affidavits, the District Court concluded (R. 46a): "It is my opinion that the petitioner freely and voluntarily gave the information in question to Skolnick and Foley. He was represented by counsel

at the time that many of the voluntary disclosures were made, a number of them before Mack came into the case. I am satisfied also that the information supplied by Mack was given with the consent, if not by the direction of the petitioner. His claim that, since Mack was not admitted to practice before the Treasury Department, he did not have the authority to appear and act in his behalf, is, in my opinion, merely an expedient."

The Court of Appeals affirmed (Pet. App. 27-31), observing that: "Not only was there no evidence of any affirmative act of deception by Skolnick or Foley, but the record shows sufficient awareness by Russo that he was himself under investigation and of course this would include the possibility of criminal sanctions." (Pet. App. 30)

The Court of Appeals therefore held that: "Since the voluntary nature of the disclosure is so clear from those portions of the affidavits which are undisputed, the district judge quite properly declined to take any further evidence at a hearing." (Pet. App. 31)

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 8-13) that the District Court erred in denying his motion to suppress without hearing testimony for, contrary to petitioner's assertions (Pet. 8-10), the affidavits on file with the court did not raise any issue of fact essential to a decision on the motion. Stripped of petitioner's many conclusory allegations, the affidavits disclose as uncontroverted facts that petitioner's first contact with any Treasury agent took place in June 1952, when he was interviewed by Special Agent Skolnick (R. 5a, 22a); that in July 1952, petitioner brought to the office of the Intelligence Unit information re-

quested by Skolnick, including the names of banks in which he had checking accounts (R. 23a); that in February 1953 Revenue Agent Foley secured through petitioner's attorney a waiver extending the period of limitations with respect to petitioner's return for 1949 (R. 19a-20a, 34a-35a); and that in May 1953, petitioner was questioned under oath by Skolnick in the office of the Intelligence Unit, at which interview he was represented by counsel and answered questions relating to his income and tax liability (R. 6a, 23a-25a, 33a, 39a-40a). Further, that following the interview of May 1953, petitioner engaged an accountant to assist him in connection with the investigation of his returns (6a, 33a-34a); that requests by the agents to examine petitioner's records were made through his attorney who referred the agents to the accountant (R. 20a, 35a); and that in the fall of 1953, the accountant submitted to the agents his work sheets and the petitioner's records (R. 20a) with the knowledge and consent of petitioner (R. 7a). In short, as the court below noted (Pet. App. 31), the voluntary nature of the disclosure by petitioner, and the absence of any conduct on the part of the investigating agents even suggestive of fraud or misrepresentation, was apparent from the undisputed portions of the affidavits; consequently, there was no need for the trial court to take testimony or receive depositions. See *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2d); *United States* v. *Gross*, 137 F. Supp. 244 (S. D. N. Y.).

Petitioner's reliance upon *Hoffritz* v. *United States*, 240 F. 2d 109 (C. A. 9th), is misplaced. In the *Hoffritz* case a hearing was necessary because there "was at least one issue of fact necessary to the decision of the motion." (240 F. 2d at 112.)

Petitioner's charge (Pet. 20-25) that the agents obtained the evidence in question through fraud, deceit and misrepresentation, in that they conducted a "joint fraud investigation in the deceptive guise of a routine audit" (Pet. 25) is effectively refuted by the uncontroverted facts. As the Court of Appeals held, "Not only was there no evidence of any affirmative act of deception by [the government agents], but the record shows sufficient awareness by Russo that he was himself under investigation and of course this would include the possibility of criminal sanctions." (Pet. App. 30.) In the light of this record, petitioner's protestations (Pet. 9, 23) that he was unaware of the "true identity or purpose of [the Special Agent] until virtually years later," and that he was led by the agents to believe that they were conducting a routine civil audit, are without foundation. If the thrust of petitioner's argument is that he had a right to be advised by the agents at the outset of the investigation that criminal charges might result and that any information he gave might be used against him, the answer is that there is no such requirement of law. *United States* v. *Achilli*, 234 F. 2d 797, 805 (C. A. 7th); *Turner* v. *United States*, 222 F. 2d 926 (C. A. 4th), certiorari denied, 350 U. S. 831; *United States* v. *Burdick*, 214 F. 2d 768 (C.A. 3d); *Montgomery* v. *United States*, 203 F. 2d 887 (C.A. 5th); *Zacher* v. *United States*, 227 F. 2d 219 (C.A. 8th), certiorari denied, 350 U.S. 993.

2. Petitioner's argument (Pet. 13-20) that the evidence was obtained illegally since neither the attorney (Pet. 9) nor the accountant who represented him during the investigation was enrolled to practice before the Treasury Department is, as both courts below

pointed out (R. 45a, Pet. App. 30), not pertinent to the issue and wholly without merit. We doubt that petitioner seriously urges upon this Court that he was not adequately represented by counsel because his former attorney, whose competence is not otherwise challenged, failed to observe the formality of obtaining a Treasury card. With respect to the accountant, who petitioner agrees (Pet. 3, 14) was engaged to assist him in the course of the investigation, suffice it to note that IR-MIM. 58, 1952-2 Cum. Bull. 297, 298, provides in pertinent part as follows:

> Thus, during the field examination process a taxpayer has the right to use the services of any person he may elect, whether or not enrolled, for the purpose of explaining his books, records, or returns to the examining agent; and the examining agent, in the factual development of a case, has not only the right but also the duty to receive information from anyone, whether or not enrolled and irrespective of the presence of the taxpayer, who has knowledge of facts pertinent to the case.
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> 3. The foregoing pertains primarily to the furnishing of information during the factual development stage of a case. However, the taxpayer also has the right, in those cases where issues or controversies have resulted from the factual development of such cases, to have any unenrolled person who has knowledge of pertinent facts accompany him or his duly enrolled and authorized representative to conferences, but such unenrolled person may appear at such conferences only when the taxpayer or his duly enrolled and authorized representative

is present in person, and then only in the capacity of a witness.

CONCLUSION

For the reasons stated, it is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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JULY 1957.